Central Law Journal.

ESTABLISHED JANUARY, 1874.

VOL. 39 ST. LOUIS, MO., OCTOBER 12, 1894. No. 15

Central Law Journal.

ST. LOUIS, MO., OCTOBER 12, 1894.

In Scott v. McNeal, the Supreme Court of the United States has finally and satisfactorily settled the question, upon which there has been more or less conflict of authority, whether letters of administration upon the estate of a person who is in fact alive have any validity or effect as against him. By the law of England and America, before the Declaration of Independence and for almost a century afterward, the absolute nullity of such letters was treated as beyond dispute. Chief Justice Marshall so decided in Griffith v. Frazier, 8 Cranch, 9, and the same doctrine was affirmed by the courts of Pennsylvania, Massachusetts, Louisiana, Alabama, Virginia, South Carolina, New Hampshire, Texas, Missouri, Wisconsin, California, Kansas and Illinois. The only judicial opinions in which the validity of such letters was maintained were delivered by the courts of New York in what is known as the Roderidgas cases (63 N. Y. 460; 76 N. Y. 316), and New Jersey. In Scott v. McNeal, the Supreme Court of Washington upheld the validity of letters of administration issued after a lapse of seven years absence in a proceeding by ejectment where the presumed dead person returned and claimed certain property theretofore sold by his administrator under order of the probate. In so deciding the Washington court followed the authority of the New York case and ignored the strong current of cases opposed thereto. The Supreme Court of the United States, has reversed this ruling holding that the jurisdiction conferred by Code Wash. Terr. Sec. 1299, on probate courts, to grant letters of administration, is limited, in the light of the common law and of other code provisions relating to the subject, to estates of deceased persons. Such a court has no jurisdiction to determine that a living man is dead, and thereupon undertake to dispose of his estate; its decision on the question whether he is living or dead cannot bind or estop him, or deprive him, while alive, of the title or control of his property. Notice to those who, after his death, may be interested in his estate, cannot be notice to him, and neither creditors nor purchasers can acquire any rights in his property through the action of a Probate Court, or of an administrator appointed by such court, dealing, without notice to him, with his whole estate as if he were dead. It is also held that *prima facie* evidence of the death of a person by presumption from his being absent and not heard of for seven years, on which a Probate Court may assume him to be dead, and appoint an administrator of his estate, may be overthrown by proof, under proper pleadings, even in a collateral suit, that he was alive at the time of the appointment of the administrator.

The grounds upon which the Supreme Court of the United States assumed jurisdiction of such a case, involving the construction and effect of a local statute and the interpretation of a State law, are interesting. The jurisdiction was assumed upon constitutional grounds, for the reason that the construction contended for by the Washington court was in derogation of the United States Constitution forbidding the taking of private property without due process of law, and that the granting of letters of administration upon the estate of a living person is not due process of law, being rendered without jurisdiction in the court or notice to the party. They hold that upon a writ of error to review the judgment of the highest court of a State upon the ground that the judgment was against a right claimed under the constitution of the United States, the Supreme Court is no more bound by that court's construction of a statute of the Territory or of the State, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the State, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another State. In every such case the Supreme Court must decide for itself the true construction of the statute.

NOTES OF RECENT DECISIONS.

NEGOTIABLE INSTRUMENT—CHECK—WHEN NEGOTIABLE—BONA FIDE HOLDER.—The Supreme Court of Missouri decide in Famous Shoe & Clothing Co. v. Crosswhite, 27 S. W. Rep. 397, that a bank check with or without the words "value received," is negotiable; that the holder of a check is not bound to show that he is a *bona fide* holder, in order to recover thereon from the maker, until it is shown that the check was obtained from the maker by fraud, and that the fact that the drawer of a check, in giving it to a person who represented himself as another, relied on the custom of the bank on which it was drawn, of requiring the payee of a check to be identified, is no defense to an action thereon by a *bona fide* holder. Black, C. J., says:

The plaintiff is a corporation engaged in mercantile business in the City of St. Louis, and the defendants are partners engaged in buying and selling horses and mules under the firm name of Crosswhite, Patton & Rubey. This suit is based upon the following check: "St. Louis, Oct. 27, 1890. Pay Herman Hickle or order one hundred and forty-nine dollars. To Mullanphy Savings Bank, St. Louis, Mo. Crosswhite, Patton & Rubey. [Indorsed] Hermann Huickel." The above spelling of the payee and indorser is taken from the check as we find it in the transcript, but hereafter we follow the statement of agreed facts in that respect. According to the agreed facts, one Herman Wilke appeared at the defendants' place of business on the day of the date of the check, and represented his name to be Herman Hickle, and that he was the owner of two mules, which he then sold and delivered to the defendants, and in payment therefor they gave him the check in question. On the same day Wilke went to the plaintiff's place of business and purchased merchandise to the amount of $74.15, and in payment therefor endorsed the check under the name of Hermann Huickle, and delivered it to the plaintiff and the plaintiff paid him the difference, namely, $74.85. The plaintiff received the check from Wilke without making inquiry of him as to how he obtained it, though he was unknown to the plaintiff's agents who sold the goods, and without his being identified. On the same day the plaintiff presented the check to the bank for payment, but payment was refused because of directions given to the bank by defendants, they having learned that the mules had been stolen by Wilke. Plaintiff procured the arrest of Wilke, and recovered back a part of the merchandise and money. If plaintiff is entitled to recover at all it is agreed that the amount it should recover is $61.15. The trial court gave judgment for the defendants, and that judgment was affirmed by the St. Louis Court of Appeals, and the case was then transferred to this court because Judge Thompson deemed the opinion opposed to St. Johns v. Homans, 8 Mo. 382, and Ivory v. Bank, 36 Mo. 475.

The first question is whether this check is a negotiable instrument. The Court of Appeals held that it was not, and this is the line of argument: No instrument except a bill of exchange is negotiable in this State, unless it appears on its face to have been issued for value received. This check does not profess on its face to have been issued for value received, nor is it a bill of exchange, and hence it is not negotiable. The chief error in this argument lies in the major proposition, which has for its authority Lowenstein v. Knapp, 2 Mo. App. 169, where the conclusion is expressed that bills of exchange and instruments containing the words "value received" are the only negotiable instruments which we have in this State, because the statute declares no other instruments negotiable. The statute provides: "Every promissory note for the payment of money to the payee therein named, or order or bearer, and expressed to be for value received, shall be due and payable as therein expressed, and shall have the same effect and be negotiable in like manner as inland bills of exchange." Rev. St. 1889, § 733. It is to be remembered that for a long time Lord Holt held that promissory notes were not negotiable, while the merchants of Lombard street insisted that they were negotiable. Parliament interfered and overruled Holt by the Act of Anne. This court at a very early day declined to follow the ruling of Lord Holt, holding that promissory notes were negotiable by the common law. Irvin v. Maury, 1 Mo. 194. The legislature, however, to put the matter at rest in this State, enacted a statute which, after some changes comes down to us in the language above quoted. Now the object—and the whole object and purpose of this statute was to make promissory notes negotiable. A promissory note to be negotiable must of course conform in form to the statute; but the statute leaves all other commercial instruments where the law merchant places them. If negotiable by that law they are negotiable in this State. This is too clear to admit of any doubt. Are checks negotiable by the law merchant? Before answering this question it is well to remember that some writers treat checks as bills of exchange, with some peculiarities, while other writers treat them as distinct commercial instruments, having some features in common with bills of exchange. While the controversy is largely one of words only, the latter method of treating checks seems to be the least objectionable because it comports with commercial usage. It is said by the Supreme Court of the United States, "Bank checks are not inland bills of exchange but have many properties of such commercial paper, and many of the rules of the law merchant are alike applicable to both." And the court then goes on to point out many matters in which they are alike and many in which they differ. Merchants' Bank v. State Bank, 10 Wall. 604. As to the element of negotiability it is said: "Checks are commercial paper and are generally affected by the rules which affect commercial paper. Thus the holder of a check payable to bearer or indorsed in blank, is presumed to be the owner, *bona fide* and for value. It is only after proof that the original issue of the check was a fraud, or that it was lost by the drawer before issue, that such a holder will be required to show his *bona fides*, to prove that he has given value for the check, and that he came into possession of it in the usual course of business. If, being obliged to show these facts, he does so successfully, it then makes no difference under what circumstances or fraud or loss the check originally left the drawer's hands. The holder shall retain and shall recover upon it at least as much as he has paid for it." Morse, Banks 3d Ed., § 393. Another writer says: "A check like a bill or note, in order to be negotiable, must be payable absolutely, and at all events to a certain person or order, or to

bearer in money;" and, "whenever a check is negotiable, it is undoubtedly subject to the same principles which govern ordinary bills of exchange in respect to the rights of the holder." 2 Daniel, Neg. Inst. 4th Ed., §§ 1651, 1652. See, also, to the same effect, Tied Com. Paper, § 440; Burns v. Kahn, 47 Mo. App. 216; Fulweiler v. Hughes, 17 Pa. St. 440; Fuller v. Hutchings, 10 Cal. 523; Merchants' Exch. Nat. Bank v. New Brunswick Savings Inst. 33 N. J. Law, 170; Bank v. Heald, 25 Md. 573. We find nothing in any of the cases in this court to which we are cited which is in conflict with what has been said. They discuss other properties and qualities of checks. The remarks made in St. Johns v. Homans, 8 Mo. 383, and in Morrison v. McCartney, 30 Mo. 186, go far to show that the court deemed checks negotiable instruments. It is true the drawer of a check may stop payment, and in doing so he takes upon himself all the consequences of his act, but this has nothing to do with the question in hand. Although the check in question does not contain the words "value received," it is a negotiable instrument, and the plaintiffs' rights must be governed accordingly. The plaintiff was not in the first instance bound to account for possession of the check. But it being shown, as it was, that the check was procured by the payee by fraud, it then devolved upon the plaintiff to show that it was a *bona fide* holder. With such a showing, the plaintiff was entitled to recover. 2 Daniel, Neg. Inst. § 1665; Morse, Banks, 3 Ed., § 393; Merchants' Exch. Nat. Bank v. Brunswick Sav. Inst., 33 N. J. Law, 170; Fuller v. Hutchings, 10 Cal. 523. The agreed facts show that plaintiff took the check in the usual course of business and paid full value therefor without any notice of the fraud. The loss must therefore fall upon defendants, who issued and put it in circulation. To hold otherwise would overthrow what we understand to have always been the law in this State. The judgment of the Court of Appeals is reversed, and the cause remanded to that court, with directions to it to reverse the judgment of the Circuit Court, and to direct the Circuit Court to enter up judgment for the plaintiff. All concur.

LICENSE—PAROL—REVOCATION—ESTOPPEL. —That a parol license to divert part of the water of a stream cannot be revoked after the licensee has expended money and labor in pursuance of the license is held by the Supreme Court of Oregon in McBroom v. Thompson, 37 Pac. Rep. 57, who say that where for eight years riparian owners and their grantors have acquiesced in the diversion, by a person who is not a riparian owner, of a part of the stream, and such person has yearly aided in keeping the channel of the stream open and expended money on his farm, which would be worthless without the water, a court of equity will not enjoin a further diversion of the water at the suit of such riparian owners. The court says:

The ditch having been constructed under a parol license from Crego, the question is presented whether such license is revocable after labor and money have been expended in pursuance thereof. "An executed license," says Lord, J., in Curtis v. Water Co., 20 Or. 34, 23 Pac. Rep. 808, and 25 Pac. Rep. 378, "is treated like a parol agreement in equity. It will not allow the statute to be used as a cover for fraud. It will not permit advantage to be taken of the form of the consent, although not within the statute of frauds, after large expenditures of money or labor have been invested in permanent improvements upon the land, in good faith, upon the reliance reposed in such consent. To allow one to revoke his consent when it was given or had the effect to influence the conduct of another, and cause him to make large investments, would operate as a fraud, and warrant the interference of equity to prevent it, under the doctrine of equitable estoppel." In Coffman v. Robbins, 8 Or. 278, it was held that a parol agreement to divide the waters of a stream, that had been acted upon by the parties for several years, under which ditches had been dug and possession given, would be enforced in equity. So, too, in Combs v. Slayton, 19 Or. 99, 26 Pac. Rep. 66, it was held that where the riparian proprietor had not claimed the exclusive right to the water of a stream, but had permitted the defendant to dig a ditch, and appropriate a part thereof, such acts evinced a tacit agreement that each should be entitled to appropriate a just proportion of the water for the purpose of irrigation, and that such agreement should be carried into effect. While it is claimed that the better rule, in view of the statute of frauds, appears to be that, so far as the question of further enjoyment is concerned, the licensor may revoke the parol license after an outlay under it (Bigelow, Estop. 666), the contrary doctrine has, by the foregoing decisions, been firmly established in this State. The reason for the estoppel in such cases rests upon the principle that the licensee, after the expenditure of money and labor on the faith of the parol license, cannot be placed in *statu quo* upon its revocation. 2 Herm. Estop. § 982. The defendants having expended their money and labor in digging the ditch upon the faith of Crego's parol license, it follows that he could not revoke it after such expenditure; and the plaintiff, having acquired the title to his premises with notice of the diversion, could obtain no greater interest therein than his grantor possessed, and hence he cannot now revoke the license. Curtis v. Water Co., *supra*.

The evidence shows that the defendants have each year, since the ditch was constructed, aided the reparian proprietors, including Crego and plaintiff, in removing obstructions from the Little Walla Walla river, and in building dams in the Tum-a-lum, under a common understanding that in consideration of such aid the defendants were to have the right to divert sufficient water for the irrigation of their lands; that the plaintiff and his grantor have for eight years, with knowledge of the diversion and use of the water, seen and acquiesced in the defendant's improvement of their farms by means thereof under a reasonable expectation that the diversion and use would be continued. And from these circumstances it is contended that the plaintiff is estopped from discontinuing the diversion and use of the water for irrigation. Such acquiescence, if voluntary, and continued for a considerable length of time, constitutes a *quasi* equitable estoppel, that does not cut off the party's title or legal remedy, but bars his right to equitable relief, and leaves him to his legal action alone. 2 Pom. Eq. Jur. § 817. The case of Dalton v. Rentara (Ariz.), 15 Pac. Rep. 37, illustrates this doctrine. That was a suit to restrain the defendant from preventing the waters of Santa Cruz river, in Arizona, from flowing in certain acequias, from which plaintiffs' land was supplied with water for irrigation. The plaintiffs had con-

tributed their proportion of labor and expense in maintaining all of such acequias for irrigating purposes equally with the defendants. The defendants, in their answer, admitted that the greater part of plaintiffs' lands, which were arid, and would raise no crops without irrigation, had been cultivated for 16 years. The court, in passing upon the question, said: "These admissions on the record are significant, and evoke a serious reflection. If the greater part of the plaintiff's lands has been cultivated for the last sixteen years, it was done with or without defendants' consent. If without their consent, have they not been guilty of laches, unreasonable delay, and inexcusable neglect, in waiting sixteen years without taking any steps to restrain the wrongful acts of plaintiffs? If the defendants were fairly put upon their guard; if they had actual knowledge that plaintiffs were diverting waters that belonged to defendants by virtue of prior appropriation; if they stood by for sixteen years or more, and saw the plaintiffs build their houses, open out their lands, and put them in cultivation, expend their money in the improvements of these homes, pay their proportion of the expenses, and bear their proportion of the labor in building and repairing the acequias, and otherwise do and perform such acts as indicated that plaintiffs believed they had equal rights with defendants to the waters of the Santa Cruz river, do not all these circumstances serve to imply that defendants waived or abandoned any exclusive prior right to said waters? At least, was there not such unreasonable delay as that they are now precluded from complaining? Will parties be permitted to stand by for sixteen years or more, and see new fields put in cultivation,—irrigated, forsooth, with water to which they have an exclusive prior right,—see large sums expended in erecting new homes, and witness new and important interest intervene, and then be heard to complain? A *fortiori*, defendants will not be heard to complain if these things were done with their consent. Indeed, our opinion is, in this case, that acquiescence—non-action—on the part of defendants, for so long a time, gave consent. They could not consent 'till title vested, and then dissent.' So that it is really immaterial whether the irrigation was done with or without the defendant's consent, if they stood passively by. See Smith v. Hamilton, 20 Mich. 433; Park v. Kilham, 8 Cal. 78; Joyce v. Williams, 26 Mich. 332." In Slocumb v. Railway Co., 57 Iowa, 675, 11 N. W. Rep. 641, the facts showed that a small creek touching a corner of plaintiff's land was crossed by defendant's railroad upon bridges at two places. The defendant filled the bed of the creek at the two crossings, and turned the channel along the side of the railway, so that the bridges were dispensed with, and the creek did not touch plaintiff's premises. The plaintiff stood by, and saw the work of diversion progressing; and it was not until after it was fully completed, at a cost of more than $5,000, that any objection was made. It was there held, upon those facts, that the trial court did not err in refusing to grant a mandatory injunction for the restoration of the stream. In the case at bar there has been more than a mere voluntary acquiescence, or standing passively by, while the defendant's were digging their ditch and improving their lands. The plaintiff and his grantor, for eight years, without any objection whatever, aided the defendants in repairing the damages caused by the winter freshets, with knowledge of their appropriation, and of the common understanding that in consideration of such aid the defendants were to enjoy the right of diverting the water for the irrigation of their lands. The defendants thus encouraged by the plaintiff's voluntary acquiescence and participation in a common purpose, laid out their money and expended their labor in making homes for their families, under an obvious expectation that no obstacle would afterwards be interposed to prevent their enjoyment. The plaintiff's objection, in view of the unreasonable delay, and of all the circumstances of the case, now comes too late; and, under the maxim that "he who is silent when he ought to speak shall not be heard to speak when he ought to keep silent," he can have no standing in a court of equity to enjoin a diversion and use of the waters of a stream that he and his grantor have tacitly encouraged.

HABEAS CORPUS—ARREST WITHOUT WARRANT — JUDICIAL EXAMINATION.—According to the Supreme Court of Indiana in Simmons v. Vandyke, 37 N. E. Rep. 973, exceptions to a writ of *habeas corpus* will be sustained where it appears that petitioner was taken into custody by a policeman on receiving a telegram from an officer of another State that he had a warrant for his arrest for forgery, a copy of which he sent by telegraph and that petitioner was delivered to the sheriff, who committed him without a judicial examination. Hackney, C. J., says:

The appellees have not aided us with any brief, argument, or citation of authority, and we find no statutory authority for making the arrest and detaining the appellant upon the facts stated in the petition and returns. Fugitives from justice from one county in this State to another county in this State may be apprehended by proceedings as provided in section 1667, Rev. St. 1894 (section 1598, Rev. St. 1881), and fugitives from another State into this State may be arrested, detained, and returned upon demand of the executive authority of the State from which the criminal is a fugitive, upon warrant and upon identification as required by section 1668 *et seq.*, Rev. St. 1894, section 1599 *et seq.*, Rev. St. 1881). It is manifest that no authority for the arrest and detention under consideration is found in the provisions cited, nor can it be said that the arrest was made upon view by the officers of the commission of crime. The act of February 12, 1838 (Rev. St. 1838, p. 319), authorized proceedings before certain judicial officers of this State, upon which arrests of fugitives from other States were permitted, and their detentions directed. That act passed into Rev. St. 1843, p. 1030, but has not been included in any subsequent revision. We do not inquire if said act is now in force, since there is no pretense that the arrest and detention in this case were made pursuant thereto. At common law, peace officers have the power to arrest upon information of the commission of felony, and without a warrant, and do not do so at the peril of proving the commission of the felony. Doering v. State, 49 Ind. 56; 1 Am. & Eng. Enc. Law, p. 732, § 2. In *Re* Fetter, 23 N. J. Law, 311, it was held that under article 4, § 2, of the constitution of the United States, the power to arrest and detain a fugitive until the authorities of the State whose laws have been offended against could make the demand in said section provided, was implied. It was said: "The denial of the power to arrest and detain an offender until the demand for his surrender be actually

made would, it is manifest, render the provisions of the constitution well-nigh nugatory. If a person committing murder, robbery, or other high crime, in one State, may, by crossing a river or imaginary line, avoid arrest or detention until an executive requisition and order for surrender may be obtained, the execution of the criminal law would be impotent indeed. Sound public policy, good faith, and fulfillment of the requirements of the constitution, all require that the arrest and detention be made of the offender, wherever he may be found, preparatory to a demand and surrender." As supporting this power, are cited People v. Schenck, 2 Johns. 479; *In re* Goodhue, 1 Wheeler, Cr. Cas. 427; Com. v. Deacon, 10 Serg. & R. 135. We have no doubt that the exercise of the power of detention does not rest wholly with the officer making the arrest, and that he should, within a reasonable time, take the prisoner before a circuit, criminal or other judicial courts and take the judgment of commitment from such court upon complaint in writing; submitting an inquiry as to the presumption of guilt, and the good faith of the officer. *In re* Heyward, 1 Sandf. 701; *In re* Leland, 7 Abb. Pr. (N. S.) 64; *Ex parte* Cubreth, 49 Cal. 436. In this case the appellant was not committed or detained upon such an inquiry, and whether our courts possess the jurisdiction by statute or by implication is not before us, though the holding of some of the courts seems to imply that jurisdiction. State v. Buzine, 4 Har. (Del.) 572; *In re* Washburn, 4 Johns. Ch. 106; *In re* Leland, *supra; In re* Rutter, 7 Abb. Pr. (N. S.) 67. *In re* Henry, 29 How. Pr. 185, was a case in many respects like the presen', and it was there said: "On the return of the writ, no affidavit or any other proof of the alleged larceny have been furnished; but all the information afforded rests in letters unauthenticated, except by the signature of the chief of police of Chicago, and the telegraphic dispatches purporting to come from him,—the last dispatch indicating that a requisition has finally been obtained. Under these circumstances, I am reluctantly compelled to grant his discharge. The officers were undoubtedly authorized to make the arrest. The rule is that a private person, even, may arrest a party, if a felony has in fact been committed, and there was reasonable ground of suspicion; but, in the case of an officer, he is justified in making an arrest if no felony was in fact committed, if he acted upon information from another, on which he had reason to rely. This is the well-settled rule in the English courts, sanctioned and followed in this State in the case of Holley v. Mix, 3 Wend. 350. In such cases the officer acts ministerially, and is entirely justified in making the arrest; and it is a power very important to be exercised, to prevent the immediate escape of felons. But he has another duty to perform. In the case where the arrest is made under a warrant, the officer must take the prisoner, without any unnecessary delay, before the magistrate issuing it, in order that the party may have a speedy examination, if he desired it; and in the case of an arrest without warrant the duty is equally plain, and for the same reason, to take the arrested party before some officer who can take such proof as may be afforded, or, if the circumstances will justify it, hold the suspected party for further examination. Pratt v. Hill, 16 Barb. 307. If this is not done with reasonable diligence, the party arrested can apply for a *habeas corpus*, calling on the officer to show cause why he is detained; and, with the return to the writ, the rule is that where the arrest is upon suspicion, and without a warrant proof must be given to show the suspicion to be well founded. 2 Inst. 52. No such proof has been exhibited to me. The original grounds of suspicion, indeed, remain, and may be deemed presumptively strengthened by the last dispatch; but they contain no element of proof, in the legal sense, and would not authorize me to retain him." The value of personal liberty is too great to permit the detention of a suspected fugitive upon the judgment of a ministerial or peace officer, and without a hearing judicial in character.

WHO MAY BE APPOINTED GUARDIANS.

Introductory Statement. — The question, "who may be appointed a guardian," presents many important phases of practical scope in the law of guardianship. Certain classes of persons are preferred for the appointment. Other classes of persons are disqualified for appointment. These classes, however, will not form the subject of the present article so much as the general considerations governing the appointment. It may be remarked that statutes frequently regulate the matter. In general it may be said that the law upon this topic largely corresponds with that governing executors and administrators, and that statutes frequently couple these classes of trustees with guardians in prescribing preferences and disqualifications.

Order of Preference in General.—The general order of preference in the appointment of guardians is, first, the father, if alive; next, after his death, the mother; and thirdly, the next of kin[1] or other relatives. But of course this order may be varied by statute. Sometimes, as in Mississippi, the statute states the same order less precisely, by giving the preference, unless the applicant is unsuitable, to the natural guardians as next of kin;[2] and sometimes, as in New Jersey, the order is changed by giving preference, in regard to infants over fourteen years of age, to the mother and next of kin.[3] In some jurisdictions, indeed, as in California and other Pacific Coast or neighboring jurisdictions, the statute specifically prescribes the considerations which are to guide the court or offi-

[1] See 9 Am & Eng. Enc. of Law, 91; 2 Lawson's Rights, and Remedies, § 854.

[2] See Farrar v. Willis, 29 Miss. 195, 201; Allen v. Pette, 25 Miss. 29, 30, 31; Ann. Code of 1892, § 2186.

[3] See Weldon v. Keen, 37 N. J. Eq. 251, 253; Albert v. Perry, 14 N. J. Eq. (1 Mc Cart.) 540, 542; Reed v. Drake, 2 N. J. Ch. (1 Green Ch.) 78, 81.

cer in awarding the custody of a minor, or in appointing a general guardian, and at the same time minutely declares the order of preference where other things are equal.[4]

Considerations Governing the Court.—In making an appointment of a guardian for an infant, the true interest of the infant is to be considered, rather than the wishes of those who are desirous of the guardianship,[5] or even of those who may be entitled to the guardianship,[6] or of the infant himself.[7] The expressed wish of the father or mother is, however, entitled to much weight, and other things being equal, will have a preponderating influence. The footing on which a contestant for the guardianship stood with the father and mother of the child or with either, while they were in life, is also a consideration of some importance,[8] and the court will likewise take into view the state of the minor's affections and attachments as well as such minor's training, education and morals;[9] as between an uncle or aunt, or other close relative, and a person more remotely related, or a stranger, the former should ordinarily be preferred.[10] But the consent of relatives is not requisite to the appointment, even where the statute requires them to be notified of the proceedings.[11] Nor is the selection of a relative obligatory upon the court, where the statute does not require it.[12] Here, also, the cardinal principle controls, that the interests of the infant are paramount to all other considerations, even those of consanguinity or affinity. Cases are indeed by no means infrequent[13] where the custody of an infant has been withheld from the father upon considerations relating to the child's welfare.[14] The same rule making the best interests of the infant govern may cause the maternal aunt to be appointed sole guardian instead of sharing such guardianship with the maternal grandmother, in such a way that each guardian should have the custody of the ward every alternate six months.[15] The safety of the funds of the infant should be a controlling consideration with the court;[16] but the mere fact that a person has a contingent interest in the accumulation of a surplus will not be regarded as a fatal objection, where the income of the property is ample.[17] Yet the saving of expense to the infant may be an important consideration,[18] and it is upon this ground that it is regarded as a circumstance in favor of an applicant that he is already a trustee of the infant for the purpose of expending the income of an estate for his support and education.[19] So if other things are equal, such as the moral fitness of the applicants to rear and train the child, and it plainly appears that the pecuniary interests of the child will be promoted by giving the

[4] Ariz. Rev. Stats. of 1887, § 1325; Cal. Civ. Code of 1893, § 246; Dak. Comp. Laws of 1887, § 2643; Mont. Comp. Laws of 1887, p. 376, § 419; 2 Utah Comp. Laws of 1888, p. 84, § 2546. See, for all except the Dakotas, Joseph & Alexander's Probate Prac., § 502.

[5] Smith v. Smith, 2 Dem. 43, 46. See Bennett v. Byrne, 2 Barb. Ch. 216, 219.

[6] Badenhoof v. Johnson, 11 Nev. 87, 88. See, also, in support of the general doctrine that the welfare of the infant is the paramount consideration: Heinemann's Appeal, 96 Pa. St. 112, 114; Matter of Meech, 1 Connolly, 539, or 7 N. Y. Supp. 257; Matter of Vandewater, 115 N. Y. 669; Griffin v. Sarsfield, 2 Dem. 47; Halley v. Chamberlain, 1 Redf. 333, 336; Cozine v. Horn, 1 Bradf. 143, 144; Lappie v. Winans, 37 N. J. Eq. 245, 248; Albert v. Perry, 14 N. J. Eq. (1 Mc Cart.) 540, 542, 543. So in the statutory setting forth of the considerations which should govern the court or officers, in various Pacific courts or neighboring States or Territories, mention is first made of "what appears to be for the best interest of the child, in respect to its temporal and its mental and moral welfare." See Ariz. Rev. Stats. of 1887, § 1325; Cal. Civ. Code of 1893, § 246, Subd. 1; Dak. Comp. Laws of 1887, § 2642, Subd. 1; Mont. Comp. Laws of 1887, p. 376, § 419; 2 Utah Comp. Laws of 1888, p. 84, § 2546, Subd. 1.

[7] Compton v. Compton, 2 Gill, 241.

[8] See Jones v. Cleghorn, 63 Ga. 335, 339.

[9] Foster v. Mott, 3 Bradf. 409, 412.

[10] See Smith v. Smith, 2 Dem. 43, 46; Morehouse v. Cook, Hopk. Ch. 226, 227.

[11] *Ex parte* Dawson, 3 Bradf. 130, 133.

[12] Vandewater's Estate, 115 N. Y. 669.

[13] Brown, J., in People v. Walts, 122 N. Y. 238, at p. 241.

[14] See for example, People v. Weissenbach, 60 N. Y. 385, 393; Matter of M'Dowles, 8 Johns. 328, 330, 332.

[15] This was the view taken where a father left his daughter, whose mother died when the child was ten months old, in the care of its maternal aunt until his death, eighteen months afterwards. His last wish was that such aunt should be the child's guardian. She was a proper person for guardian, and lived with her paternal grandfather, a man of means, with a strong affection for the child. *In re* Annan, 26 N. Y. Supp. 258.

[16] See Lee v. Lee, 67 Ala. 406, 416, as to known insolvent leaving infant's funds without security to his bondsmen, the officers of an insurance company.

[17] Smith. v. Smith, 2 Dem. 43, 46.

[18] See Bennett v. Byrne, 2 Barb. Ch. 216, 220.

[19] Bennett v. Byrne, as just cited. By statute in various of the far west jurisdictions, a trustee of a fund for the child's support is preferred even to a relative. See Ariz. Rev. Stats. of 1887, § 1325; Cal. Civ. Code of 1893, § 246; Dak. Comp. Laws of 1887, § 2643; Mont. Comp. Laws of 1887, p. 376, § 419; 2 Utah, Comp. Laws of 1888, p. 84, § 2546.

guardianship to the wealthier of the applicants, this fact may be looked to by the jury trying the issue in determining the question of guardianship.[20]

Religious Faith of Guardian.—It does not appear that the religious faith of the guardian would ordinarily, in this country, cut any figure in determining whether he should be appointed. But in some jurisdictions it is otherwise. Thus in Missouri a statute prohibits the committing of a minor to the guardianship of a person who is of a different religious persuasion from the parents, or from the surviving parent, if another suitable person can be procured, unless the minor, being of the proper age, should so choose;[21] and in Pennsylvania the matter has also received statutory and judicial attention;[22] while the point has likewise been mentioned in New York and New Jersey,[23] and has been considerably noticed in England.[24]

Discretion of Court.—In the appointment of guardians, the court is invested with some legal discretion; and its judgment will not be overruled by the supervising tribunals, except in cases of manifest abuse of such discretion.[25] Thus whether a general guardian shall be appointed for an infant and whether he shall be selected outside of the relations of the infant, is a matter committed to the discretion of the court, since it would be manifestly improper to appoint one whose interests were adverse to the possible claim of the infant. If there is nothing to show that the conclusion reached was not attained after due inquiry and examination of the attendent circumstances, the requisite abuse of discretion is not made out.[26] So in a contest between two grandmothers for the guardianship of the person and property of a child, the court may, in its discretion, ascertain by examination, the wishes of the child, though it is under 14 years of age, as to which one of the contesting parties it prefers for its guardian.[27]

Nor is the legal discretion of the appointing court as to the fitness of the person deemed the subject of review, unless that court has disregarded a positive rule of law.[28] But the discretion vested in the appointing court is generally viewed as not an arbitrary one; and if it has been erroneously exercised, the Appellate Court will correct the error.[29] Sometimes, however, as in Maine,[30] the statute regulates the court's power on a liberal basis, by leaving the appointment to the judge as a matter of discretion.

Minor's Preference.—In regard to the minor's preference in the choice of a custodian, it is considered[31] that whether the court will regard the wishes of the infant depends upon the reasonableness of such wishes and the exhibitions by the infant of sufficient intelligence to make a selection; and as to the standard of intelligence required, it seems to be "now the well settled rule that the apparent intelligence of the child is to be looked at, rather than his years."[32] But in respect to

[20] Walton v. Twiggs, 16 S. E. Rep. (Ga.) 313.

[21] See as to the construction of this statute, *In re* Doyle, 16 Mo. App. 159, 166, 167; Voullaire v. Voullaire, 45 Mo. 602, 607.

[22] See McCanns' Appeal, 49 Pa. St. 304, 309; Goenner's Estate, 20 Weekly Notes of Cases, 16.

[23] See Underhill v. Dennis, 9 Paige, 202, 209; Matter of Turner, 19 N. J. Eq. (4 C. E. Green) 423, 435, 436.

[24] See Lady Tenham's Case, mentioned in *Ex parte* Whitfield, 2 Atk. 315, at p. 316; Preston v. Lord Ferrard, 4 Brown's Parl. Cas. 298, 301; Corbeet v. Tottinham, 1 Ball & B. 59, 61; Knott v. Corbtee, 2 Phillips, 192, 195.

[25] Nelson v. Green, 22 Ark. 367, 369; Sadler v. Rose, 18 Ark. 600, 602; Pate's Appeal, 106 Pa. St. 574, 580, 51 Am. Rep. 540; Battle v. Vick, 4 Dev. 294; Matter of Vandewater, 115 N. Y. 669; *In re* Kayes, Law R. 1 Ch. App. 387, 389; Schouler Dom. Rel. (3d Ed.), § 304; *In re* Johnson, 54 N. W. Rep. (Iowa) 469. See, also, in favor of discretion of court, Week's Appeal. 37 Conn. 363; Matter of Meech, 1 Connolly, 535, 539: McCann's Appeal, 49 Pa. St. 304, 309; Gray's Appeal, 96 Pa. St. 243, 246; Grant v. Whitaker, 1 Murph. 231, 232; Mills v. McAllister, 1 Hayw. 303, 304; *Re* Lyons, 18 Weekly Rep. 238, 239, or 22 Law Times, 770. For like rule as to custody of infant under guardianship, see Matter of Welsh, 74 N. Y. 299, 301. As to immunity of appointment of foreign guardian from collateral attack, see Taylor v. Kilgore, 33 Ala. 214, 221.

[26] Vandewater's Estate, 115 N. Y. 669.

[27] Walton v. Twiggs, 16 S. E. Rep. (Ga.) 313. See, also, as to want of abuse of discretion where uncle appointed guardian was at enmity with the mother, etc., Nelson v. Green, 22 Ark. 367, 368, 69. Compare, however, suggestion as to mother's disapproval of guardian, Sadler v. Rose, 18 Ark. 600, 602.

[28] Pate's Appeal, 106 Pa. St. 574, 580, 51 Am. Rep. 540. See Senseman's Appeal, 21 Pa. St. 331, 334.

[29] White v. Pomeroy, 7 Barb. 640, 642. See, also, Matter of Feeley, 4 Redf. 307, 308; Schouler, Dem. Rel. (3d Ed.), § 304; Underhill v. Dennis, 9 Paige, 202, 208; *In re* Kaye, Law Rep. 1 Ch. App. 387, 389.

[30] See Lunt v. Aubens, 39 Me. 392, 394.

[31] *In re* Poole, 2 McArthur, 582.

[32] Olin. J., in case just cited, at p. 592. See, also, remarks of Lacy, J., in Merritt v. Swimley, 82 Va. 433, 437, 3 Am. St. Rep. 115, 118, and Knapp, J., in Richards v. Collins, 45 N. J. Eq., 283, 287, 14 Am. St. Rep. 726, 729, and likewise Green v. Campbell, 35 W. Va. 698, 702, 29 Am. St. Rep. 843, 845.

guardianship, it has been said,[33] that it is the duty of the court, in making the appointment, to consult the interests rather than the wishes of the infant. In some jurisdictions, however, it is enacted that "if the child be of a sufficient age to form an intelligent preference, the court may consider that preference in awarding the custody of the minor or appointing a general guardian.[34] The preference thus accorded to the minor in the selection of a guardian is, of course, not to be confounded with the infant's right of election of a guardian, sometimes accorded him after he reaches a certain age, usually fourteen years. The minor's power of choice of a guardian thus sometimes allowed, may be defeated by a prior award of his custody. Thus the statutory rights of a minor of fourteen or more to select or change his guardian, except where the surviving parent appointed a guardian, have been so interpreted in Texas,[35] as to preclude effect from being given by one court to such a minor's expressed desire to exchange the guardianship of one parent for that of another, by granting guardianship of his person to the parent of his choice, after another court had, in its decree of divorce between the parents, awarded him to the other parent.

San Francisco. NATHAN NEWMARK.

[33] By Margruder, J., in Compton v. Compton, 2 Gill, 241, 253.

[34] This is the case in Arizona (Rev. Stats. of 1887, § 1325); California (Civ. Code of 1893, § 246); the Dakotas, presumably (Dak. Comp. Laws of 1887, § 2642, Subd 1); Montana (Comp. Laws of 1887, p. 376, § 419); and Utah (2 Comp. Laws of 1888, p. 84, § 2546.

[35] In Jordon v. Jordan, 23 S. W. Rep. 531.

RELEASE — PLEADING — NECESSITY OF CANCELLATION — RETURN OF BENEFITS RECEIVED.

GIRARD V. ST. LOUIS CAR-WHEEL CO.

Supreme Court of Missouri, June 19, 1894.

1. In an action for damages for personal injuries, defendant, by answer, set up an alleged agreement in the nature of a release or discharge of the cause of action. To that plea plaintiff replied that the agreement had been obtained by fraud, while he was unable, because of pain and suffering caused by the injuries, to comprehend his act in signing it, and that he never assented to the agreement. Held, that the reply to the plea of a release was sufficient in an action at law, without resorting to equity to cancel that document. Gantt, Sherwood, and Burgess, JJ., dissenting.

2. Where a reply of fraud is made to a plea of release, and no point is interposed in the trial court of any deficiency in the reply on account of any omission to tender back the benefits received under the agreement for a release, and the record shows that those benefits were accounted for in the judgment, there is no prejudicial error in the omission to allege or prove an offer to return those benefits, even if such offer were otherwise necessary to avoid the release.

BARCLAY, J.: The petition states a case for damages on account of personal injuries, suffered by plaintiff while in the employ of the defendant company. It charges as the cause negligence in respect of the operation of certain hoisting machinery, under the direction of defendant's superintendent, in its shops in St. Louis; and alleges that, in consequence of that negligence (the particulars of which are not important at this stage of the proceedings), a heavy timber fell upon plaintiff, disabling him from labor, etc. The answer denies the charge of negligence, and sets up, as a bar to plaintiff's action, a written instrument, signed by plaintiff and by one of defendant's officers, in which, after reciting the fact of plaintiff's injury, the following stipulations appear: "The said Car-Wheel Co., on their part, proposes to furnish and pay for all the medical attendance necessary for his recovery from said injuries sustained by said accident, and to keep his name on its pay roll at the uniform wages per day for all working days which he has been up to this time credited, and in any other way in their power assist in his recovery until he is physically sufficiently recovered from said accident, evidenced by physician's certificate, to resume work. And that on his part, beyond the above obligation of the St. Louis Car-Wheel Co., he relinquishes all other claims whatsoever as to them; and that he agrees to this deliberately, and of his own free will, and without any undue influence from any one. The said parties, in evidence of which, and in good faith, sign this, the date first herein written." Defendant alleged compliance on its part with the above agreement, so far as plaintiff had permitted such compliance, and prayed judgment. Plaintiff, by a reply, charged that the said agreement had been obtained from him by gross fraud and misrepresentations of defendant and its agents; that at the time it was made he was in the deepest distress and mental and bodily pain, and was unable, through his bodily and mental condition, to understand or comprehend the contents of said agreement, and did never assent to the terms thereof. These allegations of fraud and incapacity are repeated in several forms with considerable particularity of detail, but the above outline will be sufficient for present purposes. The cause came to trial before Judge Dillon and a jury. It is not necessary to go into the evidence as to the plaintiff's original right of recovery, since no point is made in this court on that

branch of the case. The only questions of any difficulty now submitted concern the rules of law to be applied in view of the so-called "release" or "settlement."

The plaintiff's testimony tended to prove that his injury occurred September 13, 1889, and the agreement (which we will for convenience call a release) was signed the next day, about noon. the timber which struck plaintiff was about 18 feet long and 6 by 9 inches thick. It hit him in the back. He was knocked to the ground senseless. His arm was broken. Blood oozed from his forehead, and his face was scratched. He could not stand. He had to be carried away from the shop. He was put into an ambulance, and taken to the city hospital. The next day he was removed to his boarding house. He testified that he had no recollection of signing the release. That at that time he was unable to read or comprehend anything. If he attempted to read, he could merely "see a gleam" in front of him. "That for four or five weeks he was not in his proper mind, or able to understand things. That during the first week he did not easily recognize people who called on him." He suffered intense pain, which did not begin to abate for two months. His face and jaws were badly swollen: his eyes discolored, and almost closed. He had a lump on the back of his head for some time after the mishap. Six or eight days later he found a copy of the release on the floor of his room. He gave it to his attorney soon afterwards, and then brought this action in October, 1891. Several of his fellow workmen who called to see him on the day the release was signed and on the following day gave various descriptions of his condition. For instance: "He was excited and bewildered;" "his mind was not clear;" "he was more jovial than was usual with him;" "he did not seem rational;" "he didn't seem to me to act or talk at the time as I saw him do before." The defendant's testimony contradicted that above quoted, and tended to prove that plaintiff understood the release, assented to its terms, executed it freely, and that no fraud was practiced upon him. Under its terms, defendant employed a physician to treat plaintiff, at a cost of $50, up to the time plaintiff discharged him, shortly before bringing this suit. The defendant further paid $10 to another physician who had been called to plaintiff's aid at the shop in the emergency when he was first injured. Defendant also kept plaintiff's name on the pay roll, and was ready and willing to pay him wages according to the terms of the release; but he would not or did not accept such payment. The trial court submitted the issue of release upon instructions, under which the jury found that plaintiff signed that paper at the instance of defendant's agents, without knowing its contents, and never did assent to its terms. They also found that the release was signed when plaintiff was in such a mental condition that he could not comprehend its contents, and that defendant's agents took advantage of that condition to induce him to sign the paper without understanding it, intending thereby to defraud plaintiff of his cause of action set forth in the petition herein. On that issue the court gave the following instructions at the instance of defendant, viz.: "(4) The jury are instructed, even though you should believe from the evidence the release pleaded by defendant to have been unfair to the defendant, and not a sufficient recompense for plaintiff's injuries, still this will not relieve plaintiff from its force and effect as a bar in his recovery in this action. The only way in which plaintiff can effect the conclusiveness of this bar is to satisfy you by a preponderance of evidence that plaintiff, when he signed the release, had not sufficient mental power to know the nature of the instrument he was signing." "(7) The court instructs the jury, that the paper read in evidence, signed by the plaintiff, and termed a 'release,' is on its face a release and discharge of the cause of action sued on in this case. It is a presumption of law that the plaintiff understood and agreed to the terms and contents of said paper when he signed it, and the burden is on the plaintiff to show by a preponderance of evidence that he was not acquainted with the contents of the paper, and that he did not voluntarily agree to release his claim for damages growing out of his injury upon the terms stated in said petition, or that defendant fraudulently procured the execution thereof by him; and, unless the plaintiff has affirmatively so proven these facts to the satisfaction of the jury by a preponderance of proof, they should find for the defendant." "(12) The court instructs the jury that in determining the question whether the paper offered in evidence, and termed a 'release,' was freely and voluntarily signed by the plaintiff, they are not at liberty to consider whether the terms of said release were reasonable, nor whether the undertakings of the defendant therein constituted a full and adequate compensation for his injury." The bill of exceptions also shows that, "the cause being submitted to the jury, they found a verdict in favor of plaintiff, such verdict being an award of damages in favor of plaintiff in the sum of $1,562, less the sum of $62, paid by the defendant under the terms of the release given in evidence; leaving the amount of damages in favor of plaintiff in the sum of $1,562, less the sum of $62, paid by the defendant under the terms of release given in evidence; leaving the amount of damages $1,500." The jury also found for the plaintiff on the issues of negligence, under appropriate instructions, which need not be examined, as this appeal does not call in question any ruling on that part of the case. After the usual motions and exceptions, defendant appealed to the St. Louis Court of Appeals, but, as the judges of that court were divided in opinion (Girard v. Wheel Co., 46 Mo. App. 81), the case was transferred to the Supreme Court, under the provisions of the constitution (Amend. Const. 1884, § 6.)

1. Defendant's first proposition is that this ac-

tion for damages is not maintainable, because the release has not been set aside by a decree in equity; in other words, it is claimed that the paper in question is a complete defense at law to the cause of action to which it relates, no matter how the paper may have been obtained. This position has been defended with much ability, but no resources of counsel are sufficient to conceal its inherent weakness. The testimony for plaintiff tends strongly to prove that he was incapable of understanding the release when he signed it, and that he did not comprehend, or intend to assent to, its terms. The jury so found in response to instructions. Those facts, when established, destroyed the substance of the agreement which the release in form expressed. They took from the apparent contract what was essential to its legal force and validity, namely, the element of assent by the plaintiff. That element is a necessary part of every contract. Without it, a mere writing, expressing some formula of words, imposes no obligation. The signature of plaintiff, obtained to such a paper without the assent of his mind to the act, deprived him of no legal right. He might, indeed, affirm such a signature, or make it his lawful act by his subsequent conduct, the effect of which would be to give to the agreement that assent which was necessary to originate an obligation on his part; but, in the absence of such acts as amounted to an approval of it, he might proceed to enforce his rights, irrespective of such a paper. Brewster v. Brewster (1875), 38 N. J. Law, 119. In circumstances such as are here exhibited, a writing in the form of a release, which never acquired original validity as a contract for want of competent assent to its terms, may be disregarded by a court of law in the administration of justice, without the intervention of a court of equity. The paper in question is, in contemplation of law, nothing more than the form of a contract; and, on finding that the substance which should give life to an obligation is wanting, the court may cast aside the form, and proceed to judgment, notwithstanding the fraud which may have brought the verisimilitude of an obligation into existence. Hartshorn v. Day (1856), 19 How. 211; Vandervelden v. Railroad Co. (1894), 61 Fed. Rep. 54, opinion by Judge Shiras. A court of law, upon ascertaining such a fraud, may properly pass over it to the conclusion which it considers to be just; thus, in effect, discarding the fraud as an obstacle to the exercise of its jurisdiction. It is not thought necessary, at this day, to further argue the correctness of this proposition. It has been repeatedly asserted in earlier decisions in this State, both before and since the adoption of the reformed code of procedure in 1849. Burrows v. Alter (1842), 7 Mo. 424; Wright v. McPike (1879), 70 Mo. 175. They conform to a multitude of precedents elsewhere, many of which are cited in the briefs of counsel, to which may be added: Thompson v. Faussat (1815), Pet. C. C. 182, Fed. Rep. Cas. No. 13,954; Bliss v. Railroad Co. (Mass. 1894), 36 N. E. Rep. 65. The case of Blair v. Railroad Co. (1886), 89 Mo. 383, 1 S. W. Rep. 350, which is cited as having some tendency to the contrary, goes no further in that direction than to approve the practice of proceeding to first cancel the release for fraud, upon allegations stating a cause of action in equity, before trying the other cause of action at law on the merits of the plaintiff's original claim. While that course may be adopted, it is not essential where the alleged fraud goes to the integrity of the release as a legal agreement, which is the case in the present action. The Blair decision does not declare it necessary to go into equity to get rid of a paper executed in such circumstances as here appear.

2. It is next contended that the release must stand, because plaintiff did not, before action brought, offer to refund the amount paid by defendant for medical services to plaintiff under the terms of that paper. The verdict gave the defendant the benefit of that credit upon the plaintiff's claim by reducing his damages to that extent ($62); but it is urged that that mode of refunding the fruits of the agreement for a release does not satisfy the requirements of law. The substance of defendant's contention is that a tender of the benefits received under the release was essential to plaintiff's case and that without it the action cannot be maintained. Assuming, as this court is now bound to do in view of the evidence and the findings of the jury, that the release was not the valid act or contract of the plaintiff, then it was, at best, voidable at his option; that is to say, he was at liberty to ignore it in the assertion of his legal rights. His act in bringing the present suit was a plain and unmistakable repudiation of it, and a distinct notice that he discarded and denied the obligation which it apparently imposed Ward v. Day (1863), Law J. 33, Q. B. 3; Clough v. Railway Co. (1871), L. R. 7 Exch. 26; Dawes v. Harness (1875), L. R. 10 C. P. 166. He had done nothing to ratify it or adopt it as his act. Was he required, in such a case, to seek the defendant's officers, and tender back the value of the medical services rendered to him before beginning his action? He has, before judgment accounted for everything of value received by him by virtue of the supposed release, and the defendant has had credit therefor, as the verdict of the jury on its face shows. But the attitude of the defendant throughout, as well as before, the litigation, its plea of release, its setting aside in an envelope the wages of plaintiff each week, all indicate that any tender by plaintiff of repayment for the medical services would have been useless. Since the execution of that paper, defendant has asserted and relied upon its validity, and still asserts it. It has been decisively held in other cases that no preliminary tender can be insisted upon as a bar to legal action where the facts show that tender would have been rejected. Deichmann v. Deichmann (1871), 49 Mo. 107; Westlake v. City of St. Louis (1882), 77 Mo. 47. In

such a state of the facts a tender would be, as Mr. Bigelow remarks "an idle cermony." Bigelow, Frauds (1888), p. 424. No distinction should be made, and, in my opinion, none exists in principle, between actions for personal injuries and other actions at law in respect of the right now under consideration, or in respect of the testimony required to sustain a judgment. A preponderance of evidence is necessary to support an allegation of fraud in a court of law, and it is for the trial judge in the first instance to determine whether or not the testimony offered upon that allegation is reasonably sufficient to justify an inference of the fraud charged. It has been often held in other jurisdictions that a tender of money received by virtue of a release of similar tenor to that in question here need not be made before bringing suit, where the release was obtained by fraud, but that it is sufficient to offer its return, and to account for it by the judgment. Duval v. Mowry (1860), 6 R. I. 479; Smith v. Salomon (1877), 7 Daly, 216; Butler v. Railroad Co. (1891), 88 Ga. 594, 15 S. E. Rep. 668; Kley v. Healy (1891), 127 N. Y. 555, 28 N. E. Rep. 593; Sheanon v. Insurance Co. (1892), 83 Wis. 507, 53 N. W. Rep. 878; Kirchner v. Sewing Mach. Co. (1892), 135 N. Y. 182, 31 N. E. Rep. 1104; Railroad Co. v. Acuff (Tenn. 1892), 20 S. W. Rep. 348. That certainly is the rule in equity in reference to rescission (Martin v. Martin [1860] 35 Ala. 560; Metropolitan El. Ry. Co. v. Manhattan Ry. Co. [1884], 14 Abb. N. C. 224; Lusted v. Railway Co. [1888], 71 Wis. 391, 36 N. W. Rep. 857); and in equity, as a general rule, a better showing is required of a plaintiff, conditional to granting relief, than is exacted by the practice in courts of law. It has been also ruled that, where a release is found to have been obtained by fraud practiced upon one incapable, because of mental weakness, to validly enter into such a contract, no necessity exists for refunding the fruits of the release before action brought. O'Brien v. Railroad Co. (Iowa, 1894), 57 N. W. Rep. 425; Johnson v. Granite Co. (1892), 53 Fed. Rep. 569. Whether these rulings correctly declare the law applicable to release of the kind now in question we think it unnecessary to decide, in view of the condition of the record now before the court.

3. If it be conceded for the sake of argument that a tender was necessary to sustain plaintiff's right to recover upon his original cause of action, let us see whether the judgment actually reached in the trial court can be supported upon the pleadings, evidence, and findings of the lury, irrespective of the question of a tender. No objection to the sufficiency of the plaintiff's case for the want of such tender was at any time interposed in the trial court, unless it may be implied in the request for an instruction that, under the pleadings and evidence, plaintiff was not entitled to recover. But at that stage of the case the testimony tending to prove fraud in obtaining from the plaintiff the execution of the release had been admitted under the allegations of the reply. Upon the facts before the court at that time plaintiff would have been entitled to recover at law, upon the footing of the fraud, a measure of damages at least as great as that which the judgment shows was actually meted out to him upon the same facts which the jury found as the basis of their verdict. Plaintiff, at the outset of the proceeding, in his petition might have set up his original cause of action and the fraud by which he was induced to execute the release for it, and, on showing these facts, have lawfully claimed a recovery of the difference between what he received by reason of the release and the damages justly due him upon his former cause of action. That theory would have involved acquiescence in the release, which he might have conceded without waiving his right to recover for the fraud in obtaining it. His right of action for fraud on such a showing could be maintained without any offer to return the fruits of the release. These positions are sustained by abundant precedents. 1 Whart. Cont. § 282; Protective Union v. James (Ind. 1893), 35 N. E. Rep. 919. The only difference between a recovery on that basis and the judgment reached on the trial now under review is one of form. The essential facts to sustain both appear in the plaintiff's pleadings, and were found by the jury. Part of those facts are first stated in the reply, but the only objection made at any time to the reply in the Circuit Court was on the ground that it admitted the existence of a release uncanceled when the action was brought. That objection we have held to be untenable for the reasons given in the first paragraph of this opinion. No objection was made to any of the plaintiff's pleadings on the ground that a tender of the fruits of the release was essential to plaintiff's right of recovery, nor was that proposition advanced in the trial court by defendant in any request for instructions. By positive law in this State the trial courts are expressly authorized, where defendant has appeared and answered, as in this record, to "grant any relief consistent with the case made by the plaintiff and embraced within the issues." Rev. St. 1889, § 2216. By the Code of Procedure this court is directed in every stage of the action "to disregard any error of defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party" (Rev. St. 1889, § 2100); and, further, not to "reverse the judgment of any court, unless it shall believe that error was committed by such court against appellant or plaintiff in error, and materially affecting the merits of the action." *Id.* § 2303 In addition to these very plain and practical rules of decision, the statute declares, furthermore, that it is the duty of the courts to so construe the provisions of the code of pleading and practice as "to distinguish between form and substance." *Id.* § 2117. In this state of the record and of the law, would it not be the sheerest technicality, a complete surrender of substance to barren form, to hold that the judgment should be reversed for want of a tender, when the facts alleged, proved, and

found show a solid foundation for the result reached irrespective of the question of a tender? Viewing the case at bar broadly on its merits, the judgment of the trial court seems abundantly supported by the facts and by the law applicable thereto. The court would depart from the precepts contained in the statutes referred to should it reverse the judgment for any of the objections which have been urged to it here. It should not be done. In my opinion, the judgment ought to be affirmed.

NOTE.—The conclusion of the court in the principal case is antagonized by three of the judges of the court who announce their views through Burgess, J. We will simply call attention to some of the authorities, reviewed by the dissenting judge, which announce a rule contrary to the majority opinion with respect to the failure of plaintiff to return to the defendant whatever he had received of value from it by way of compromise, and for the release of his right of action, and to rescind the contract. In Gould v. Bank, 86 N. Y. 75, no offer to return the money paid by way of compromise was made. Earl, J., said: "The compromise agreement unless annulled, is an absolute bar to this action. It is a general rule, laid down in the text-books and reported cases, that a party who seeks to rescind a contract into which he has been induced to enter by fraud must restore to the other party whatever he has obtained by virtue of the contract. Cobb v. Hatfield, 46 N. Y. 533. He cannot retain anything he received under the contract and yet proceed in disaffirmance thereof."

The rule is laid down in Evans v. Gale, 17 N. H. 573, as follows: If one has been induced to make a contract to pay money or to deliver anything by such means that he is entitled to rescind the transaction, he must, in order to do so, first restore the other party whatever may have been received in exchange for the money or other things he seeks to recover back, and to which he would become entitled as his own property immediately upon the rescission of the act, whose proper effect would have been to vest in the other party." The reason of the rule, as stated by Chief Justice Shaw in Thayer v. Turner, 8 Metc. (Mass.), 550, is that "the plaintiff, as far as it is in his power, shall put the defendant in *statu quo*, by restoring and revesting his former property in him, without putting him to an action to recover it back, before he can exercise his own right to take back the property sold, or bring an action for it." Kimball v. Cunningham, 4 Mass. 502. In the case of Doane v. Lockwood, 115 Ill. 490, 4 N. E. Rep. 500, it was held that, when the vendor had received any valuable consideration or note of the purchaser upon a sale of goods, he cannot rescind the contract for fraud without first returning, or offering to return, the consideration received, whatever it may be. So when a party is induced to sell property upon false and fraudulent representations as to amount of property, and to take a note to secure the payment of the purchase price, he may rescind the contract by offering to return the note; but he cannot maintain replevin for the property sold until he does so. Moriarty v. Stofferan, 89 Ill. 528. If anything has been paid by the purchaser, although he obtained the property through fraud, before the vendor can recover it he must restore whatever value he received to the purchaers. The parties should be put in *statu quo* as far as possible. Stevens v. Hyde, 32 Barb. 171; McMichael v. Kilmer, 76 N. Y. 36; Graham v. Meyer, 99 N. Y. 611, 1 N. E. Rep. 143; Baird v. City of New York, 96 N. Y. 567; Tisdale v. Buckmore, 33 Me. 461; Camplin v. Burton, 2 J. J. Marsh. 216; Gifford v. Carvill, 29 Cal. 589; Estes v. Reynolds, 75 Mo. 563; Bisbee v. Ham, 47 Me. 543; Bigelow, Frauds, pp. 73, 74; Kreuzen v. Railroad Co. (City Ct. N. Y.), 13 N. Y. Supp. 588. When one has received anything of value on a settlement of a right of action, and executed a release thereof, it follows inevitably that, the contract of settlement not being void, it constitutes an insuperable barrier against a recovery so long as it is not rescinded or avoided by an offer to return the consideration paid for it. It was, in principle, so held in Insurance Co. v. Howard, 111 Ind. 544, 13 N. E. Rep. 103. It was there decided "that it did not alter the case that the compromise may have been brought about by fraud and misrepresentation of the defendant, or that in the end it was found that a sum largely in excess of the amount paid to settle the disputed liability was due the plaintiff." See, also, Brown v. Insurance Co., 117 Mass. 479, and Lee v. Railway Co., L. R. 6 Ch. App. 527. In the case of Railway Co. v. Hayes, 83 Ga. 558, 10 S. E. Rep. 350, the plaintiff was injured by a railway accident. The defendant pleaded a settlement of the claim, and the payment of $100 to plaintiff in satisfaction thereof. Issue was taken on this plea, and it was held by the court that plaintiff could not successfully reply by showing that the agreement of release was obtained by defendant's fraud, without also showing that before commencing his suit he had tendered to the defendant the sum received, with demand of return of what defendant had received from him; thus rescinding the settlement. Bigelow, Frauds, 73, 74; Beach, Mod. Eq. Jur. § 552; Alexander v. Railway Co., 54 Mo. App. 70. The same rule has been announced by the St. Louis Court of Appeals in the case of Cahn v. Reed, 18 Mo. App. 115; and by this court in the cases of Jarrett v. Morton, 44 Mo. 275; Hart v. Handlin, 43 Mo. 171; and in Estes v. Reynolds, 75 Mo. 563.

It will thus be seen," says Judge Burgess, "that the authorities are almost unanimous in holding that, where money or other valuable thing is paid on a settlement to obtain a release of any right of action, before the person to whom it is paid, and who has the right of action, can recover it, he must return or offer to return whatever he has received, if of any value; and this he must do although the settlement or release was obtained by fraud. And it is also manifest from the decided weight of authority that the offer to return whatever of value has been received as a consideration for the settlement or release must be made before or at the time the suit is brought, and the contract or agreement, in so far as it lies in the power of the party desiring to do so, rescinded. This question has never been directly passed upon by the appellate courts of this State in a case where the action was for personal injuries, except in two cases,—the case at bar, in which the St. Louis Court of Appeals, by a majority opinion, held that, as the plaintiff had been induced by fraud or undue influence to release his right of action, he might sue upon such right of action without first obtaining the annulment of the release by suit in equity; and, at such release was pleaded as a defense to the action, he might, in his reply, set up the fraud or undue influence in avoidance of it. Biggs, J., dissented from this decision. In the case of Alexander v. Railway Co., the ruling was directly to the contrary, and in that case it was held that, where fraud is alleged to have been practiced upon a party in the compromise settlement of a claim for

damages at which a money consideration passed, a return or offer to return the latter is a prerequisite to the right to annul the contract of settlement, and to sue upon the original cause. While it is true that in the case of Mateer v. Railway Co., 105 Mo. 351, 16 S. W. Rep. 839, the answer pleaded a settlement of plaintiff's right of action, and the payment of a money consideration for the release, the question now under consideration was not passed upon or adverted to, so that case cannot be considered as an authority on this question. In this State, the question as to whether the plaintiff, before suing or at the time thereof, under the circumstances disclosed by the evidence, must have placed the defendant in *statu quo* by returning or offering to return to it everything of value received by him in the consideration for the release, is an open one, the nearest approach to an adjudication upon that question by this court being the case of Blair v. Railroad Co., 89 Mo. 334, 1 S. W. Rep. 367, wherein it was held that the plaintiff, who, as she alleged in her petition, had by fraud been induced to compromise a right of action that she had against the defendant therein for damages, might include in the same petition two counts,—one to set aside the settlement for fraud, offering to return the money received by her on the settlement; and the other an action on the case for damages. That this is the proper practice seems clear. A proceeding to set aside a settlement or release obtained by fraud should be by a proceeding in equity, and should be tried by the court."

BOOKS RECEIVED.

A Treatise on General Practice, containing Rules and Suggestions for the Work of the Advocate in the Preparation for Trial, Conduct of the Trial, and Preparation for Appeal. By Byron K. Elliott and William F. Elliott, Authors of a Treatise on the Law of Roads and Streets, and of a Treatise on Appellate Procedure. In Two Volumes. Indianapolis and Kansas City. The Bowen-Merrill Company, 1894.

A Compilation of the Law of Iowa concerning Corporations, with Annotations of the Decisions of the Supreme Court of Iowa, and Notes of some Decisions of other Courts, together with General Suggestions for Organization and Management, and Forms for Organization, and of such other general matters as are considered Useful on the Subject. By Henry F. Galpin, Attorney and Counsellor-at-Law. Storm Lake, Iowa. Honeyman & Company. Plainfield, New Jersey. 1894.

A Treatise upon the Law of Pleading under the Codes of Civil Procedure of the States of New York, Connecticut, North Carolina, South Carolina, Ohio, Indiana, Kentucky, Wisconsin, Minnesota, Iowa, Missouri, Arkansas, Kansas, Nebraska, California, Nevada, Oregon, Colorado, Washington, North Dakota, South Dakota, Montana, Idaho, Wyoming and the Territories of Arizona and Utah. By Philemon Bliss, LL. D. Professor of Law in the Missouri State University, and late Judge of the Supreme Court of Missouri. Third Edition. Revised and Annotated by E. F. Johnson, B. S., LL. M., Instructor of Law in the University of Michigan. St. Paul, Minn. West Publishing Co. 1894.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCIDENT INSURANCE—Notice.—Under an accident policy which provides that, in case of an injury totally disabling the insured from carrying on his work, notice of the accident shall immediately be given the company (giving full particulars), and, in case "such" injuries cause the death of the insured, notice shall be given "in like manner," it is not necessary, where the injuries caused death, but did not totally disable the insured, at the time, from working, to give notice of the accident at the time it happened, as the policy fails to provide for any notice in such case.—MCFARLAND V. UNITED STATES MUT. ACC. ASS'N OF CITY OF NEW YORK, Mo., 27 S. W. Rep. 436.

2. ACCORD AND SATISFACTION — Failure to Perform Agreement.—The fact that a person injured through the negligence of a city agreed to accept a certain sum in satisfaction of his claim does not bar his right of action against the city, when the city council afterwards merely authorized the comptroller to pay him such sum, and he did not accept it, and no tender was made to him.—ROGERS V. CITY OF SPOKANE, Wash., 37 Pac. Rep. 300.

3. ACCORD AND SATISFACTION — Pleading.—In an action for breach of warranty in a deed, defendant answered, alleging that subsequently to the delivery of the deed the parties entered into an agreement to the effect that defendant place in the hands of a certain person a certain sum, to be paid to plaintiff in satisfaction of any damages from a breach of the covenant, and that said sum was placed in the hands of such person, who was advised of the disposition to be made thereof: Held, that it was a good plea of accord and satisfaction.—REICHEL V. JEFFREY, Wash., 37 Pac. Rep. 296.

4. ACCOUNT STATED — Subsequent Credits.—Where a merchant renders a statement of goods sold, which is assented to by the debtor, and payments are made on account at various times thereafter, he cannot recover the balance due in an action on a stated account, with-

out proof that a new account showing the balance claimed had been rendered and assented to.—LOVENTHAL v. MORRIS, Ala., 15 South. Rep. 672.

5. ALTERATION OF INSTRUMENT.—Plaintiff made and signed a written offer to manufacture certain goods for defendant at a specified price, and defendant wrote his name below that of plaintiff. Afterwards, plaintiff interlined above defendant's signature the words, "All terms and conditions included in above approved, read, and agreed:" Held, that defendant was not liable as on an accepted offer, since the alteration was a material one.—AMERICAN PUB. CO. v. FISHER, Utah, 37 Pac. Rep. 259.

6. APPEAL — Dismissal — Re-instatement.—Where an appeal is dismissed for non-compliance with a rule of court requiring the pages and lines of the transcript to be numbered, and marginal references to be made, a subsequent compliance is not sufficient cause for reinstating it, especially when no excuse for non-compliance is given.—EGAN v. OHIO & M. RY. CO., Ind., 37 N. E. Rep. 1014.

7. APPEAL — Reversal and Dismissal — Mandate.—Where the Supreme Court reverses a decree in favor of a complainant, and remands the cause, with directions to dismiss all the bills and cross-bills, it cannot be contended upon a second appeal that a supplemental bill should not be dismissed because it had not been answered when the original decree was rendered, since the decision on the former appeal is conclusive as to the rights of the parties.—WINDETT v. RUGGLES, Ill., 37 N. E. Rep. 1021.

8. ASSIGNMENT FOR CREDITORS—Attorney of Assignee—Purchase of Claims.—Where an attorney, employed by an assignee to settle claims with the creditors, compromises the claims, giving his own notes in settlement at the rate of fifty cents on the dollar, with the understanding that the estate is to pay them when due, he cannot, on failure of the estate to do so, and after seeing that the estate is in fact solvent, have the claims assigned to a third person, who advanced to him the money to pay the notes, and collect the full amount of the claims for the benefit of such third person.—SUTLIFF v. CLUNIE, Cal., 37 Pac. Rep. 224.

9. ASSIGNMENT FOR CREDITORS — Fraudulent Preferences.—A voluntary deed of assignment, in which the assignee is fraudulently preferred to a large amount, is void, though he did not participate in the fraud.—COBLENTZ v. DRIVER MERCANTILE CO., Utah, 37 Pac. Rep. 242.

10. ASSIGNMENT FOR BENEFIT OF CREDITORS — Payment.—Where a claim proved against the estate of an insolvent consists of two items, one of which is secured by mortgage, and is afterwards paid in full out of the proceeds of the mortgaged property, it is error, after such payment, to order that the claimant be paid dividends proportioned to his entire claim as proved, instead of to the residue of his claim.—FIRST NAT. BANK OF PEORIA v. COMMERCIAL NAT. BANK OF PEORIA, Ill., 37 N. E. Rep. 1019.

11. ASSUMPSIT—Demand.—No demand is necessary for money due on a contract for boarding men, where defendants not only had notice of plaintiff's claim, but ignored it, by utterly refusing to make settlement, though frequently requested to do so.—CHAPPEL v. WOODS, Wash., 37 Pac. Rep. 286.

12. BANKS—Drafts—Deposit.—Where plaintiffs drew drafts on the persons to whom they had sold cotton for the price thereof, and caused them to be placed in defendant bank after making an agreement with it as to the amount of exchange it should have for collecting them, the officers of the bank knowing that such drafts included plaintiffs' profits on the purchase and sale of the cotton, it will be presumed that the drafts were deposited to plaintiffs' credit, and the bank has the burden of proof to show that they were deposited to the credit of persons from whom plaintiffs bought the cotton.—FARMERS' & MERCHANTS' BANK OF BLOOMING GROVE v. SLAYDEN, Tex., 27 S. W. Rep. 424.

13. BONA FIDE PURCHASERS—Notice—Agents.—Where G employed M simply to effect an exchange of land with H on specified terms, the agency is special, and, it not being within the scope of M's employment to examine and pass on the title of the land to be exchanged for, notice to M of an unrecorded deed of the land would not be notice to G, especially where M was also the agent of H in the exchange, and as such obtained the information, and in addition had an interest in concealing the fact, his commissions depending on a consummation of the exchange.—HICKMAN v. GREEN, Mo., 27 S. W. Rep. 440.

14. CARRIERS OF PASSENGERS—Injuries—Negligence.—A complaint, in an action against a railroad company, alleging that, while on the platform of a car attached to a train on defendant's road, a collision occurred, through the negligence of defendant's employees, causing plaintiff's foot to be so badly crushed as to necessitate amputation, and that he received other permanent injuries through such collision, states a good cause of action.—BOUKNIGHT v. CHARLOTTE, C. & A. R. CO., S. Car., 19 S. E. Rep. 915.

15. CERTIORARI — Supreme Court.—*Certiorari* is not available to review an interlocutory order of the Circuit Court in a proceeding in which it has jurisdiction, before the final determination of such proceeding, on the alleged ground that the Circuit Court had no jurisdiction to make the order.—STATE v. VALLIANT, Mo., 27 S. W. Rep. 379.

16. CLAIM AND DELIVERY—Evidence.—To maintain an action for the recovery of personal property where it is alleged that defendant is in possession thereof, it must be shown that he was in possession at the commencement of the action.—GARDNER v. BROWN, Nev., 37 Pac. Rep. 240.

17. CONFLICT OF LAWS—Statute of Limitation—Personal Injuries.—Comp. Laws Kan. 1879, § 3546, makes a right of action barred by any statute unavailable as a cause of action or ground of defense. *Id.* § 3539, limits the bringing of civil actions for injury to another's right, not arising out of a contract, to two years after injury accrued: Held, that even if the right of action, as well as the remedy, is extinguished by such statutes, defendant, in pleading them, must aver that both itself and plaintiff were residents of Kansas during the whole of said two years; and it is not enough that the injury occurred in Kansas, and that defendant had agents in that State who could have been served with process.—WILLIAMS v. ST. LOUIS & S. F. RY. CO., Mo., 27 S. W. Rep. 387.

18. CONSTITUTIONAL LAW—Fellow-servants—Statute.—The legislature has power to pass a law declaring what class of employees shall thereafter be deemed fellow-servants.—GALVESTON, H. & S. A. RY. CO. v. WORTHY, Tex., 27 S. W. Rep. 426.

19. CONSTITUTIONAL LAW—Local and Special Laws.—By Const. art. 6, § 31, providing that the general assembly shall have no power to establish criminal courts unless except in counties having a population of over 50,000, the right to establish them in the latter counties is expressly recognized, and neither an act establishing such a court nor a subsequent act providing it with a clerk separate from the Circuit Court can be condemned as local or special legislation.—STATE v. YANCY, Mo., 27 S. W. Rep. 380.

20. CONTEMPT — Appeal.—Where the superior court makes an order for family allowance from which an appeal is taken, an administrator is not guilty of contempt for not paying said allowance pending an appeal.—RUGGLES v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO, Cal., 37 Pac. Rep. 211.

21. CONTRACT—Acceptance.—Where a resident of one State writes to a resident of another State, offering to make him a quitclaim deed to certain land, and the latter replies, accepting the offer on the condition that the former turns over to him certain additional deeds, such acceptance does not create a contract.—EGGER v. NESBIT, Miss., 27 S. W. Rep. 385.

22. CONTRACT — Gambling Contracts by Agents. — Where a principal engages an agent to purchase wheat, who, instead, employs a broker to buy "futures," and the principal, without knowledge of the transaction, accepts the benefits, she thereby ratifies the agent's acts, and cannot recover the money from the broker in case of subsequent losses, as she is *in pari delicto*.—WYMAN v. MOORE, Cal., 37 Pac. Rep. 230.

23. CONTRACT OF SURETYSHIP—Guaranty —Suretyship is defined to be an accessory promise, by which a person binds himself for another already bound, and a guaranty is a collateral engagement to answer for the debt, default, or miscarriage of another person; the former being treated of in the Code, and the latter being governed by the precepts of the law merchant. A contract of suretyship or guaranty, like other contracts, requires the concurrence of intention in two minds, one of whom promises something to another who accepts. Consequently a mere offer to guarranty is not binding until acceptance by the person to whom it is made, and until acceptance, it is revocable.—LACHMAN v. BLOCK, La., 15 South. Rep. 649.

24. CONTRACTS — Public Policy — Pooling Railroad Business.—An agreement between railroad companies, by the terms of which all their roads are to be operated, as to through traffic, as if "operated by one corporation which owned all of them," and which provides for an actual division of such traffic, and, where this is not done, for a division of the gross earnings thereof, the obvious purpose being to suppress or limit competition, and to establish rates without regard to their reasonableness, is contrary to public policy, and void.—CHICAGO, M. & ST. P. RY. CO. v. WABASH, ST. L. & P. RY. CO., U. S. C. C. of App., 61 Fed. Rep. 993.

25. CONVERSION BY RECEIVER.—Where a receiver is directed by the court to take possession of property in the possession of a third party, and he demands possession thereof as a receiver, and possession is given to him as a receiver, he is not personally liable for conversion.—TAPSCOTT v. LYON, Cal., 37 Pac. Rep. 225.

26. CORPORATIONS — Appointment of Receiver. — Where a corporation, in pursuance of the laws of the State where it was created, has been adjudged insolvent, and placed in the hands of a receiver with full powers to control and manage its affairs, and where such corporation, its officers, directors, agents and attorneys, has been absolutely enjoined from in any manner continuing the business of said corporation, or from attempting to use its name, privileges, or franchises for any purpose whatever, held, that an officer of the corporation could not use its name to prosecute a writ of error in another State against the objection of the receiver. — AMERICAN WATER-WORKS CO. OF NEW JERSEY v. FARMERS' LOAN & TRUST CO., Colo., 37 Pac. Rep. 269.

27. CORPORATION—Foreign Corporations—Contracts. —Where Gen. St. §§ 1524-1531, require foreign corporations to comply with certain requisites before doing business in the State, and provide that an agent of such a corporation, doing business therein before the requisites are complied with, shall be guilty of a misdemeanor, a person contracting with such a corporation before it has complied with the statutory requisites is estopped to deny the authority of the corporation to make the contract, and capacity to sue thereon.—LA FRANCE FIRE ENGINE CO. v. TOWN OF MT. VERNON, Wash., 37 Pac. Rep. 287.

28. CORPORATION —Insolvent Corporation — Preferences.—A mortgage given in good faith to a creditor by a firm doing a paying business is not void, as to other creditors, because its debts were greater than its assets, apart from its good will, when the mortgage was given.—BROOKS v. SKOOKUM MANUF'G CO., Wash., 37 Pac. Rep. 284.

29. CORPORATIONS— Misuse of Franchise.—Where a State attacks a corporation for acts of its officers *ultra vires*, or contrary to the constitution or laws of the State, it must charge and prove the abuse or misuser of its franchises relied on as ground of forfeiture.—STATE v. TALBOT, Mo., 27 S. W. Rep. 366.

30. CORPORATIONS — Organization. — Rev. St. 1889, § 2771, provides that corporations may be created thereunder for enumerated purposes, and subdivision 11 thereof provides that corporations may be created "for any other purpose intended for pecuniary profit or gain not otherwise specially provided for, and not inconsistent with the constitution and laws of this State:" Held, that subdivision 11 authorizes an incorporation for the purpose of issuing bonds to be paid for by purchasers thereof in monthly installments, and to be redeemed as might be prescribed, and of selling and disposing of such bonds in Missouri.— STATE v. CORKINS, Mo., 27 S. W. Rep. 363.

31. CORPORATION — Stockholders — Pleading.—In an action by judgment creditors of a corporation for the unpaid balances of stock subscriptions, the defense that defendant stockholders purchased their shares in open market and in good faith, without notice that any amount was unpaid thereon, must be pleaded.—RYAN v. JACQUES, Cal., 37 Pac. Rep. 186.

32. COUNTY COMMISSIONERS— Contracts.—A board of county commissioners, having power to contract for the services of a county physician, has power to make such contract for a year, though the members of the board are about to go out of office in a few days.—WEBB v. SPOKANE COUNTY, Wash., 37 Pac. Rep. 282.

33. COURTS — Enjoining Collection of Judgment.— Where a public administrator, ordered by the Probate Court to take charge of a decedent's estate, has recovered judgment against a surety on the bond of the decedent's trustee, he cannot be enjoined by the Circuit Court from collecting the judgment, the Probate Court having jurisdiction over all matters pertaining to probate business, under Rev. St. 1889, § 3397.--GREEN v. TITTMAN, Mo., 27 S. W. Rep. 391.

34. COURTS—Jurisdiction—Members of Legislature.— Where the constitution provides that "the house of representatives shall be judge of the returns, elections, and qualifications of its members," no court is authorized to order or advise the clerk as to whose name shall be placed upon the roll. —BINGHAM v. JEWETT, N. H., 29 Atl. Rep. 694.

35. CRIMINAL LAW— Cross-examination. — Where a defendant has testified in his own behalf he may be asked on cross-examination, for the purposes of affecting his credibility, whether he had been previously arrested for a similar offense.— PEOPLE v. LARSEN, Utah, 37 Pac. Rep. 258.

36. CRIMINAL LAW—Information—Charging two Distinct Acts.—Where a statute makes two or more distinct acts connected with the same transaction indictable, each one of which may be considered as representing a phase in the same offense, and no motion to quash before arraignment is presented, such information is not fatally defective because they are coupled in the same count.—STATE v. PRIOR, Kan., 37 Pac. Rep. 169.

37. CRIMINAL LAW—Larceny.—An information alleging that defendant committed grand larceny, in stealing a railroad ticket worth $30, and money of the value of $22, of the moneys and property of one I, is insufficient to charge the crime of grand larceny, since it fails to state that the ticket was stamped, dated, and signed, and since it would otherwise be worthless, and not the subject of larceny.--STATE v. HOLMES, Wash., 37 Pac. Rep. 283.

38. CRIMINAL LAW—Larceny—Procuring Property by Fraudulent Personation.—A sewing machine is a subject for larceny, within 2 Hill's Code, p. 665, providing that every person who shall fraudulently personate another, and, in such assumed character, receive any money, "or other property whatever," intended to be delivered to the party so personated, with the intent to convert the same to his own use, shall be guilty of larceny.—STATE v. SMITH, Wash., 37 Pac. Rep. 290.

39. CRIMINAL PRACTICE—Assault with intent to Kill.—An information under section 42 of the crimes act, charging the defendant with having assaulted, maimed, wounded, and disfigured with a knife, S, is not fatally defective because the words "maliciously" or "willfully" are omitted, where the information charges that the defendant did "unlawfully and feloniously" make the assault upon S, and did "feloniously strike him," etc.—STATE v. DOUGLAS, Kan., 37 Pac. Rep. 172.

40. CRIMINAL PRACTICE— Embezzlement— Duplicity.—Act March 31, 1860, provides that if any public officer, having charge of public money, shall convert any part of it to his own use, or invest it in property, or shall prove a defaulter, or fail to pay it over when legally required, every such act is an embezzlement: Held, that an indictment which charges in one count conversion and failure to pay over is not bad for duplicity, since the two acts constitute but one crime when they involve the same money.—COMMONWEALTH v. MENTZER, Penn., 29 Atl. Rep. 720.

41. CRIMINAL PRACTICE— False Record Entries — Indictment.—An indictment of a corporation officer, under Pen. Code, § 563, for making false entries in a record with intent to defraud, if it set out the entries in *haec verba*, and allege them to be false, need not state wherein they are false.—PEOPLE v. LEONARD, Cal., 37 Pac. Rep. 222.

42. CRIMINAL TRIAL—Homicide—Discharge of Jury.—The discharge of a jury before the completion of a trial, without the consent of the accused, and without sufficient reason, will ordinarily bar a further trial; but where, after the trial was begun, a juror was reported sick, and where the sickness and incapacity of the juror to proceed with the trial was heard and determined by the court by judicial methods, and a finding made, based upon testimony, which is not preserved, that a discharge was absolutely necessary, the appellate court cannot say that there was not good cause for the discharge, nor that the discharge should operate as an acquittal.—STATE v. REED, Kan., 37 Pac. Rep. 174.

43. CRIMINAL TRIAL—Jurors.—A person testifying on his *voir dire*, in a criminal case, that he had read newspaper reports, and formed an opinion, but could try the case fairly, is a competent juror.—STATE v. DUFFY, Mo., 27 S. W. Rep. 358.

44. CRIMINAL TRIAL— Jury—Disqualification.—When, after the jury has been sworn in a criminal case, a juror states to the court that he has heard his brother in-law talk about the case, and has formed and expressed an opinion, the court is not obliged to let the trial proceed with said juror, and, if it do so, there is error.—STATE v. CASON, S. Car., 19 S. E. Rep. 918.

45. DEED—After-acquired Title.—A deed purporting to convey a fee-simple estate, and also all the after-acquired interest of the grantor, causes any after acquired interest of the grantor to inure to the benefit of the grantee.—GREEN v. GREEN, Cal., 37 Pac. Rep. 188.

46. DEEDS—Condition— Forfeiture.—Where one conveys land in fee on condition that no liquor shall be sold thereon, but the grantee makes such use of the land for 11 years, with the grantor's knowledge, and without objection by him, and makes improvements adapted to such use, equity will not permit a forfeiture of the estate, but will leave the grantor to his other remedies.—LEHIGH COAL & NAV. CO. v. EARLY, Penn., 29 Atl. Rep. 736.

47. DEED—Description.—A deed describing the premises as three lots in the town of M, "confirmed to and in the name of" the grantor, "one of which, a lot of two arpents," the grantor "claimed under H," one confirmed in the grantor's name, and "one other, of one arpent, confirmed to and in the name of" the grantor, which lots have been injured by earthquake, is sufficient to pass the interest of the grantor in the latter lot.—BROWN v. OLDHAM, Mo., 27 S. W. Rep. 409.

48. DEED—Reservation of Easement.—Where a deed of land reserves a road through the land conveyed, in order to be able to reach a highway from other land owned by the grantor, it will be presumed, in the absence of a clear indication in the deed to the contrary, that he reserved merely the use of the road, and not the fee therein.—THE REDEMPTORIST v. WENIG, Md., 29 Atl. Rep. 667.

49. EASEMENTS—Passage of Light and Air.—A landowner cannot acquire by user an easement over adjoining land for the passage of light and air.—WESTERN GRANITE & MARBLE CO. v. KNICKERBOCKER, Cal., 37 Pac. Rep. 192.

50. EQUITY PRACTICE—Amendment of Decree.—A decree cannot be amended after a year has lapsed since the entry thereof on simple motion to amend, or petition, or even petition for a rehearing.—FITCH v. RICHARDS, R. I., 29 Atl. Rep. 689.

51. EVIDENCE — Mental Capacity — Opinion.—Testimony of one who is neither an expert nor an intimate acquaintance (Code Civ. Proc. § 1870, subd. 10), that a person's appearance was "irrational," though of doubtful competency, is not necessarily prejudicial when the witness also details the facts on which said conclusion was based.—HOLLAND v. ZOLLNER, Cal., 37 Pac. Rep. 231.

52. EXECUTION SALE—Equitable Relief.—Where land worth $26,000 is sold in separate sales to satisfy a judgment of $1,700 and the purchasers are the attorneys of the judgment creditor, and it appears that they directed the land to be sold in such parts as to prevent its bringing a fair price, such sales may be set aside, even after the time for redemption has expired, especially where they have assured the judgment debtor that the statutory period for redemption would not be insisted on.—YOUNG v. SCHROEDER, Utah, 37 Pac. Rep. 252.

53. EXECUTORS — Accounting — Disbursements.—Where residuary legatees receive from the executors various amounts in unequal sums, after all debts and pecuniary legacies are paid, but no legatee receives more than his share of the residue, interest should not be charged on the several amounts so received in an accounting by the legatees as to the sums received by them.—MCNULTY v. DE SAUSSURE, S. Car., 19 S. E. Rep. 926.

54. FEDERAL OFFENSE—Post Office—Indecent Letters.—Rev. St. § 3893 (1 Supp. Rev. St. p. 621), provides that "every obscene, lewd or lascivious book, pamphlet, picture, paper, letter, writing, print or other publication of an indecent character, whether sealed as first-class matter or not, is hereby declared to be non mailable matter:" Held, that a private letter in a sealed envelope is within the prohibition of this statute if it is of an indecent character.—UNITED STATES v. LING, U. S. D. C. (Conn.), 61 Fed. Rep. 1001.

55. FEDERAL OFFENSE—Violation of Pension Laws.—An indictment under Rev. St. § 5421, averring in substance that defendant transmitted to the commissioner of pensions a falsely altered certificate made by the board of surgeons in relation to a claim for pension of a named person, is bad, in that it fails to show that such certificate was transmitted in support of, or in relation to, any specified account or claim pending in a named department, bureau, or office.—UNITED STATES v. KESSEL, U. S. D. C. (Iowa), 62 Fed. Rep. 59.

56. FRAUDULENT CONVEYANCES — Conveyance to Wife.—A married woman, being a creditor, or any relative, as well as a stranger, may negotiate for a mortgage of the property of the debtor as security for a claim, or may accept a deed of conveyance in satisfaction thereof, provided the consideration be adequate, and the creditor in no respect, either expressly or by implication; either actively or passively, arising from notice which may be imputed to him from a knowledge of such circumstances as will put a prudent man upon his guard, aids the debtor in any effort or intention to defraud, delay, or hinder his other creditors.—FOLK v. FONDA, N. J., 29 Atl. Rep. 676.

57. GARNISHMENT — Dissolution by Bond—Judgment.

—Where a garnishee answers admitting the indebtedness, but alleges that such indebtedness has been previously garnished in another action against defendant, and defendant gives bond to dissolve the garnishment as provided by Acts 1890 91, p. 590, judgment cannot be rendered on the bond until the claim under the previous garnishment has been adjudicated, and then only for the amount remaining in the hands of the garnishee after satisfying such claim.—GUILFORD v. REEVES, Ala., 15 South. Rep. 661.

58. GUARANTY BY OFFICER OF CORPORATION.—The treasurer of a corporation wrote a letter accepting, for the corporation, plaintiff's offer to sell certain property at a specified price, in which letter he said, "I will guaranty you the money between 30 and 40 days:" Held, that this language was only an assurance that the company would pay during that time, and not a personal guaranty of payment.—RITER v. SUN FOUNDRY & MACH. CO., Utah, 37 Pac. Rep. 257.

59. HIGHWAY — Dedication of Highway — Easement and Servient Estate.—The fact that the board of directors of the State prison have, by the constitution, charge of the prison, does not authorize them to close a public highway passing through the prison grounds because it facilitates the escape of prisoners.—PEOPLE v. MARIN COUNTY, Cal., 37 Pac. Rep. 203.

60. HUSBAND AND WIFE—Community Property.—The wife of an insane person cannot authorize the sale of community property where such sale is not for the maintenance and support of the family, but in payment of an antecedent debt.—CASON v. LANEY, Tex., 27 S. W. Rep. 420.

61. HUSBAND AND WIFE — Wife's Separate Estate.—Rev. Code Maryland 1878, p. 481, §§ 19, 20, provide that a married woman may acquire property by purchase, and that it shall not be liable for her husband's debts, and authorize her to give notes, but only when joined by her husband: Held, that the mere fact that the husband joins his wife in executing a note for goods purchased by her does not vest title thereto in him, and, in an action by the wife against a creditor of the husband who had seized and sold such goods as belonging to him, it was error to charge that the wife had acquired no title as against the husband's creditors, this being a question for the jury.—BOLLINGER v. GALLAGHER, Pa., 29 Atl. Rep. 751.

62. INSOLVENCY— Examination of Insolvent—Privilege of Witness.—Const. art. 1, § 13, provides that no one shall be compelled, in any criminal case, to be a witness against himself. Section 154, Pen. Code, provides that every debtor who fraudulently sells or conceals his property with intent to defraud or delay his creditors is punishable by fine or imprisonment, or both. Petitioner was adjudicated an insolvent, and was cited to appear before the court and be examined regarding his disposition of the property; Held, that he was not obliged to answer questions relating to his fraudulent disposition of his property.—EX PARTE CLARKE, Cal., 37 Pac. Rep. 230.

63. INSURANCE—Mutual Insurance— Companies—Assessments.—A policy holder in a mutual insurance company, who insures on the cash plan, is not bound by a by-law making all members liable to future assessments, if such by-law was not brought to his notice before the policy was issued.—GIVEN v. RETTEW, Pa., 29 Atl. Rep. 703.

64. INTOXICATING LIQUORS—Control of Sale by Cities.—The passage of the prohibitory liquor law by the State legislature does not prevent cities from enacting ordinances providing for the control of the liquor traffic within the limits of such cities.—IN RE THOMAS, Kan., 37 Pac. Rep. 171.

65. INTOXICATING LIQUOR — Sale—Evidence.—In a prosecution for selling intoxicating liquors without a permit, it is not necessary, since the enactment of chapter 149 of the Laws of 1885, for the State, in the first instance, to prove that the party charged did not have a permit to sell intoxicating liquors for the excepted purposes.—STATE v. CROW, Kan., 37 Pac. Rep. 170.

66. JUDGMENT BY DEFAULT — Grounds for Setting Aside.—Where defendant was personally served with summons, a judgment by default will not be set aside because the attorney he requested to defend the action, after a demurrer to the complaint was overruled, failed to answer, especially when defendant states that he did not read the complaint, and does not state that he told the attorney of facts which would be a defense, and it appeared that he left the State two days after the service of summons, and did not communicate further with his attorney.—EDWARDS v. HELLINGS, Cal., 37 Pac. Rep. 214.

67. JUDGMENT — Jurisdiction — Appearance.—Where the record in partition fails to show that the court acquired jurisdiction of a defendant or his interest, either by summons or publication of notice, a recital in the record of the judgment, "Now, at this day, come the said parties, by their respective attorneys," following the title of the cause in which such defendant's name appears among the other defendants, is insufficient to support the judgment against defendant in collateral attack.—BELL v. BRINKMAN, Mo., 27 S. W. Rep. 374.

68. JUSTICE OF THE PEACE — Jurisdiction—Title to Land.—Plaintiff alleged that defendant agreed to locate him on vacant government land, which it failed to do. Defendant admitted the contract, and alleged that it did locate plaintiff on vacant government land; "that defendant is informed and believes that plaintiff claims that said lands were not vacant government lands, but that they were in the possession of some other person; and that defendant alleges that they were not in the possession of some other person at the time of the location of plaintiff thereon:" Held, that the title and possession of real property was not necessarily put in issue by the pleadings, so as to deprive a justice of the peace of jurisdiction.—HART v. CARNALL HOPKINS CO., Cal., 37 Pac. Rep. 196.

69. LANDLORD AND TENANT—Rent.—In an action for rent, representations by plaintiff, not a covenant of the lease, of what would be done by him in regard to other premises than those leased, and not alleged to be either false or fraudulent, constitute no defense, though not fulfilled.—WILCOX v. PALMER, Pa., 29 Atl. Rep. 757.

70. LANDLORD AND TENANT—Revocation of Agency.—Cotenants of premises authorized one of their number to let the premises and collect the rent, and he made a lease to defendant as trustee: Held a revocable agency, and that, when plaintiff, one of the cotenants, revoked the agency as far as she was concerned, and notified defendant thereof, she could recover rent accruing after such notice, though he paid it to the former agent.—BARRETT v. BEMELMANS, Pa., 29 Atl. Rep. 756.

71. LIFE INSURANCE COMPANY—Insolvency—Distribution of Assets.—When a life insurance company is adjudged insolvent, and is dissolved, the measure of the damages suffered by a policy holder is the net value of the policy, without regard to the health of the holder, and calculated, as of the date of the dissolution of the corporation, according to the life insurance tables of mortality, less the outstanding premium notes, if any.—COMMONWEALTH v. AMERICAN LIFE INS. CO., Pa., 29 Atl. Rep. 660.

72. LIMITATIONS OF ACTIONS—Execution.—An execution regularly issued within seven years will stop the running of the statute against a judgment, though issued for that sole purpose, and without expectation of thereby securing satisfaction.—MURPHY v. KLEIN, Miss., 15 South. Rep. 658.

73. MANDAMUS — Parties.—In *mandamus* proceedings to enforce a private right, the real party in interest should be named as plaintiff, and such proceedings should not be entitled in the name of the State on the relation of such party.—HOWARD v. CITY OF HURON, S. Dak., 59 N. W. Rep. 833.

74. MASTER AND SERVANT—Contributory Negligence.—In an action for the death of plaintiff's husband through defects in a scaffold, it appeared that deceased was directed to select the materials for the scaffold from a body of miscellaneous lumber: Held, that an instruction that, unless such selection was in the usual course of his employment, he need not examine the lumber, but might presume that it was sufficient, was erroneous.—BOETTGER V. SCHARPE & KOKEN ARCHITECTURAL IRON CO., Mo., 27 S. W. Rep. 466.

75. MASTER AND SERVANT—Injury—Incompetency of Fellow servant.—In an action for personal injuries resulting from the negligence of a fellow-servant, on the ground that his habit of using intoxicating liquors was of such notoriety that defendant must have known it, a recovery cannot be had where there is no evidence that he was intoxicated when the accident happened.—COSGROVE V. PITMAN, Cal., 37 Pac. Rep. 232.

76. MECHANIC'S LIEN—Notice of Claim.—Code Civ. Proc. § 1187, requires the statement for a mechanic's lien to be essentially true: Held, that a notice of lien was insufficient where it stated that the claim was for labor and materials, while only labor was furnished.—WAGNER V. HANSEN, Cal., 37 Pac. Rep. 195.

77. MECHANIC'S LIEN—Sale—Redemption.—Where a person entitled to redeem from a master's sale procures an assignment of the certificate of purchase to himself, instead of redeeming, such assignment does not constitute a redemption, and does not prevent redemption by other parties.—BOYNTON V. PIERCE, Ill., 37 N. E. Rep. 1024.

78. MECHANIC'S LIEN — Wife's Separate Estate.—A married woman is incapable of making a contract for labor performed or material furnished on her separate property that will bind her in a personal judgment, but her estate may be charged for such a demand under her contract.—NUTT V. CODINGTON, Fla., 15 South. Rep. 667.

79. MORTGAGE FORECLOSURE—Jurisdiction.—Federal courts have no jurisdiction of a bill by the beneficiary under a deed of trust against the debtor and the trustee to foreclose the deed,—the trustee having refused to act,—where the trustee and debtor are citizens of the same State, since the trustee, although a defendant, is really on the same side of the case as the beneficiary.—SHIPP V. WILLIAMS, U. S. C. C. of App., 62 Fed. Rep. 4.

80. MUNICIPAL CORPORATION—Public Improvements—Exemption of Railroad Property.—Const. art. 12, § 14, which declares that railways are highways and railroad corporations common carriers, does not exempt land used by a railroad company for depot and yard purposes from a special tax for street improvements.—CITY OF NEVADA V. EDDY, Mo., 27 S. W. Rep. 471.

81. MUNICIPAL CORPORATION—Public Sewers—Use of Streams.—Under the constitutional provision that private property shall not be taken or damaged without just compensation, damages must be paid for injuries to a farm by the discharge of a city sewer into a stream flowing through the farm. — JOPLIN CONSOLIDATED MIN. CO. V. CITY OF JOPLIN, Mo., 27 S. W. Rep. 406.

82. MUNICIPAL CORPORATION—Street—Specification of Material. — A board of public improvements being vested with the exclusive right to select material for street improvements, the ordinance submitted by them may specify a material in which there is a monopoly: the council having a right to reject the bid, if, in its opinion, exorbitant.—VERDIN V. CITY OF ST. LOUIS, Mo., 27 S. W. Rep. 447.

83. MUNICIPAL OFFICER—Increase of Salary.—A chief engineer of a city fire department, appointed by the council and subject to removal by it, is not an officer within Const. art. 14, § 8, prohibiting an increase in the salary of any officer during the term of office.—STATE V. JOHNSON, Mo., 27 S. W. Rep. 399.

84. MUTUAL BENEFIT INSURANCE.—An unincorporated society, having the characteristics of a fraternal organization, required as a condition of membership a physician's certificate of good health. On admission each member received a certificate entitling his beneficiary to $2,000 on his death. Each member, to keep his certificate in force, must pay an assessment on each death among the members: Held, that the society was in effect, a mutual life insurance company, and the certificate an insurance contract.—DANIFER V. GRAND LODGE A. O. U. W., Utah, 37 Pac. Rep. 245.

85. NEGLIGENCE—Dangerous Premises—Excavations.—Where a building is being constructed on a city lot, and the excavation in the sidewalk is not protected as required by ordinance, the owner of the lots is liable to persons injured by falling therein, though the work is being done by an independent contractor.—SPENCE V. SCHULTZ, Cal., 37 Pac. Rep. 220.

86. NEGLIGENCE OF SERVANT.—The act of the agent of a railroad company, who also kept a store at the station, in placing an open barrel of salt under a warehouse situated beside the track, and which belonged to a milling company, though on the railroad's right of way, is not the act of the railroad company, so as to render them liable for injuries to cattle attracted thereby.—BERGER V. ST. LOUIS, K. & N. W. R. CO., Mo., 27 S. W. Rep. 393.

87. NEGLIGENCE — Texas Cattle—Communication of Disease.—In order to render a railroad company liable, independently of statute, for damage to a person's cattle caused by their contracting Texas fever from Texas cattle which the company was transporting through the country, and which escaped from its custody, by treading over the ground over which they had gone, it must not only be shown that the cattle escaped through defendant's negligence, but also that the company knew that, if the cattle were allowed to go at large, native cattle treading over the ground after them were apt to contract the disease.—GRIMES V. EDDY, Mo., 27 S. W. Rep. 479.

88. NEGOTIABLE INSTRUMENT — Action on Note—Allegation of Delivery.—In an action on a note, an averment that defendant "duly made" the note implies a delivery, and is sufficient as against a general demurrer.—SMITH V. WAITE, Cal., 37 Pac. Rep. 232.

89. NEGOTIABLE INSTRUMENT—Note—Failure of Consideration.—Code, § 3503, allows the maker of an instrument for the payment of money, when sued by the assignee or indorsee, to plead want or failure of consideration, in the same manner as if the suit had been brought by the payee: Held, that the maker of a note is not estopped to deny the existence of a consideration because he knew, when executing it, that it was to be discounted by a certain person, if he made no representation to, and concealed no fact from, such person.—MERCHANTS' & PLANTERS' BANK V. MILLSAP, Miss., 15 South. Rep. 659.

90. NEGOTIABLE INSTRUMENT—Note—Joint Liability.—Where there are three or more joint makers of a note, and one of them dies while the note is unpaid, and before suit brought, the surviving makers are jointly liable on the note.—STEVENS V. CATLIN, Ill., 37 N. E. Rep. 1023.

91. NOTE—Place of Payment.—Where a note is made payable at a certain place, the maker, in order to avoid costs and interest after maturity, must deposit or tender the amount of the note at that place, though the note is not there.—MCCAULEY V. LEAVITT, Utah, 37 Pac. Rep. 164.

92. PARTITION—Sale.—A sheriff's deed in partition, made before approval of the sale by the court, is void; and such sale may be set aside, upon report thereof to the court, without notice to the purchaser.—BURDEN V. TAYLOR, Mo., 27 S. W. Rep. 349.

93. PAYMENT TO SELF AS TRUSTEE.—A purchaser at partition sale, who qualifies as executor of one of the heirs, to whom part of the proceeds of the sale was due, is assumed to have paid the date to himself as executor; and the distributees should proceed against him as executor, rather than by motion for resale under the partition decree.—NEWMAN V. CLYBURN, S. Car., 19 S. E. Rep. 913.

94. PLEADING — Attachment.—A complaint which shows on its face that the debt sued for is not yet due, and which does not allege why acts of fraud, allowing the plaintiff, under Comp. Laws 1888, § 8308, subd. 5, to sue before his claim falls due, is demurrable, even though it states that attachment proceedings have been begun under said act, since the complaint should show a good cause of action without reference to the attachment affidavit.—SELZ, SCHWAB & CO. v. TUCKER, Utah, 37 Pac. Rep. 245.

95. PLEADING—Waiver of Demurrer.—Where defendant demurs, and afterwards answers, but before trial withdraws the answer, and allows judgment to be entered, it will be presumed that he waived the demurrer, where the record discloses nothing to the contrary.—EVANS v. JONES, Utah, 37 Pac. Rep. 262.

96. PLEDGE — For Another's Debt — Fraud.—A wife's assignment of her policy on her husband's life as collateral for his debt, whereby the assignee is to have "all benefit and advantage to be derived therefrom to the extent of such interest as he may have when said policy becomes a claim," is good in the assignee's hands to the extent of his interest, though the wife signed it relying on false statements of her husband as to the amount of the debt,—the assignee having no knowledge of such statements,—since the husband was in no sense his agent in procuring the assignment.—KULP v. BRANT, Penn., 29 Atl. Rep. 730.

97. PRACTICE — Change of Venue — Convenience of Witnesses.—It is no abuse of discretion to refuse plaintiff a change of venue for the convenience of witnesses, when defendant files a stipulation admitting the truth of the facts alleged in the complaint.—STOCKTON COMBINED HARVESTER & AGRICULTURAL WORKS v. HOUSER, Cal., 37 Pac. Rep. 179.

98. PRINCIPAL AND SURETY — Condemnation Proceedings.—No action lies against the sureties on a condemnation bond for damages already recovered in an action of trespass against the principal.—COBURN v. TOWNSEND, Cal., 37 Pac. Rep. 202.

99. PROCESS—Writ—Service of Publication.—Where a summons is issued, but the service thereon is defective, and an order for publication was obtained, it should be made of the first summons, and a publication of an alias summons is void, there being no provision in law for such a summons.—COFFIN v. BELL, Nev., 37 Pac. Rep. 240.

100. PUBLIC LAND — Boundaries — Shore Line.—The patentee of a fractional subdivision bordering on a navigable lake, which has been meandered in the government surveys, takes title to all land beyond the meander line formed by the gradual subsidence of the lake, since the boundary is not the meander line, but the water line.—KNUDSEN v. OMANSON, Utah, 37 Pac. Rep. 250.

101. PUBLIC LANDS—Transfer before Receiving Patent.—Under Rev. St. U. S. § 2263, providing that before any notice is made under section 2259 proof of the settlement and improvement thereby required shall be made to the satisfaction of the register and receiver of the land districts in which the lands lie, and that all assignments and transfers before the issuing of the patent shall be void, one who has delivered the final proof of his pre emption claim, the affidavit required by statute, and the money for the land to the register may transfer the land, though he has not received a patent therefor.—MERRILL v. CLARK, Cal., 37 Pac. Rep. 238.

102. QUIETING TITLE.—An action to quiet title cannot be maintained by one whose possession is obtained by trespass against one whose acts of possession, under color of title, are as emphatic and notorious as those of plaintiff.—DAUDT v. KEEN, Mo., 27 S. W. Rep. 361.

103. RAILROAD COMPANY—Failure to Fence Track.—A statute requiring railroad companies to fence their tracks, though in terms only imposing as a penalty a double liability for injuries to live stock, caused by not doing so, renders a railroad company liable for the death of an engineer, caused by a collision of his engine with a bull that had come on the track through a a defect in the fence.—DICKSON v. OMAHA & ST. L. RY. CO., Mo., 27 S. W. Rep. 476.

104. RAILROAD COMPANIES — Negligence—Transitory Action.—An action against a railroad company for injuries occurring in another State, through negligence, may be maintained without proof of the *lex loci*, it being a transitory common law action.—BURDICT v. MISSOURI PAC. RY. CO., Mo., 27 S. W. Rep. 458.

105. REAL-ESTATE BROKERS — Right to Commissions.—A broker's right to commissions for procuring a purchaser for land under an agreement therefor is not affected by the fact that he knew the principal had title to only five-sixths of the land.—MARTIN v. EDE, Cal., 37 Pac. Rep. 199.

106. RECEIVER — Assigned Estate.—In an action against a firm by judgment creditors to set aside as fraudulent an assignment for the benefit of creditors, and for the appointment of a receiver, the complaint alleged that plaintiff's executions had been returned unsatisfied, that the assignment contained an illegal preference, that unless prevented by the court the assignee would turn over the property to the preferred creditors, and that the assignee was insolvent: Held, that the complaint was not demurrable on the ground that plaintiffs had an adequate remedy at law.—OTTENBURG v. BARNES, Utah, 37 Pac. Rep. 267.

107. RES JUDICATA — Accounting by Joint Executors.—The decree of the orphans' court, settling and allowing a joint account of co-executors, is not conclusive on the executors, so as to render them jointly liable thereon, but they may show which executor received certain of the specified assets, so as to render him, only, liable therefor.—WEYMAN v. THOMPSON, N. J., 29 Atl. Rep. 685.

108. SALE—Conditional Sale—Chattel Mortgage.—Under Comp. Laws, § 2814, which declares that the provisions of the chattel mortgage act shall not apply to conditional sales of railroad equipment and rolling stock, a conditional sale of a locomotive is valid as against the vendee's creditors, though it is not executed and recorded as chattel mortgages are required to be.—LIMA MACH. WORKS v. PARSONS, Utah, 37 Pac. Rep. 244.

109. SALE — Title in Purchaser.—When goods are sold on terms that the vendee shall give his notes for the purchase price, and that the title shall remain in the vendor until a mortgage is given to secure the notes or the price is paid, and no right of innocent third parties intervenes, the title continues in the seller, although he recovers judgment on the notes. After such judgment he may reclaim the goods by replevin.—CAMPBELL PRINTING PRESS & MANUF'G CO. v. ROCKAWAY PUB. CO., N. J , 29 Atl. Rep. 681.

110. STATED ACCOUNT.—Where the debtor tells the person in whose hands an account has been placed for collection, without objecting thereto, that he will pay the same, it is a stating of account between the parties, and the account bears interest from that date.—STICKLER v. GILES, Wash., 37 Pac. Rep. 293.

111. TAXATION — Exemptions.—A corporation, owning a quarry from which it takes slate and manufactures into sizes and shapes desired is exempt from taxation as to the portion of its capital invested in its manufacturing business.—COMMONWEALTH v. EAST BANGOR CONSOLIDATED SLATE CO., Pa., 29 Atl. Rep. 706.

112. TAXATION OF CAPITAL STOCK.—When a tax has been paid by a corporation on its capital stock, the same stock cannot be again charged for taxes in the hands of separate holders of the shares.—COMMONWEALTH v. LEHIGH COAL & NAV. CO., Pa., 29 Atl. Rep. 664.

113. TAXATION—Seat in Stock Exchange.—A seat in a stock exchange, which is a personal privilege of being and remaining a member of a voluntary association, with the assent of the associates, is not taxable property.—CITY AND COUNTY OF SAN FRANCISCO v. WANGENHEIM, Cal., 37 Pac. Rep. 221.

114. TOWN ORDINANCE—Validity.—Under Code, § 3799, giving towns power to make such by-laws as commissioners deem necessary, if not inconsistent with the laws of the land, a town may pass an ordinance forbidding a minor to enter a barroom, unless married, or unless he is acting as the agent of his parent or guardian —STATE v. AUSTIN, N. Car., 19 S. E. Rep. 919.

115. TRADE NAME — Injunction. — Defendant, the owner of land known as "Millbrae Station," formed a copartnership with plaintiff to keep cows on said land, and sell the milk therefrom under the trade-name of "Milbrae Dairy." Afterwards the partnership was dissolved, plaintiffs taking the milk routes and business of selling milk, and defendant, who remained the owner of the land, agreeing to supply them with milk therefrom. Later plaintiffs terminated the contract with defendant, and took no more of his milk, but still conducted a milk business under the name of the "Milbrae Dairy," and formed a corporation under the name of the "Millbrae Company," to carry on the business: Held, that plaintiffs could not ask for an injunction to restrain defendant from using the name "Millbrae" in a competing business since their own use of the name was a fraud on the public.—MILLBRAE CO. v. TAYLOR, Cal., 37 Pac. Rep. 235.

116. TRIAL—Instructions — Master and Servant.—An instruction which refers to heavy machinery moved by steam, and having revolving cylinders connected by cog wheels, as being of a dangerous character, does not charge as to any controverted fact, but merely recognizes a matter of common knowledge.—HARRIS v. SHEBECK, Ill., 37 N. E. Rep. 1015.

117. TRUST — Constructive Trust—Agreement as to Land.—Plaintiff verbally contracted with defendant to join him in the purchase of certain land which defendant had contracted to purchase by a certain time. On plaintiff's failure to pay his share of the money, defendant purchased the land in his own name: Held, that defendant could not be compelled to convey half the land to plaintiff on the ground that there was a constructive trust in favor of plaintiff.—TAYLOR v. KELLY, Cal., 37 Pac. Rep. 216.

118. TRUST— Foreclosure — Interest of Trustees.—Where property is held in trust to secure the payment of certain debts, the facts that the trustees are interested as partners in certain of the creditor firms does not affect their right to foreclose and sell the trust property.—GALLIGHER v. YOSEMITE MINING & MILLING CO., Utah, 37 Pac. Rep. 264.

119. TRUST FUNDS—Lien of Cestui que Trust.—No lien exists on firm ass ts in the hands of a receiver for trust funds used by the firm in the payment of debts and operating expenses, and not shown to have gone to swell the specific fund sought to be charged.—FERCHEN v. ARNDT, Oreg., 37 Pac. Rep. 161.

120. WATERS—Streams—Pollution.—Where a city constructs sewers so that they empty into a stream and render unfit for use all the waters on a farm, by reason of part of the stream going underground through seams and fissures in the limestone bed of the stream, damages may be recovered by the owner of the farm.—GOOD v. CITY OF ALTOONA, Penn., 29 Atl. Rep. 741.

121. WILL—Charities—Bequests.—A bequest to an institution in Philadelphia that will give shelter to homeless people at night, irrespective of creed, color, or condition, will be sustained in favor of a society shown to have been organized and in operation a number of years, to be engaged in maintaining shelters on the terms mentioned in the will, and to be the only institution in the city so engaged.—IN RE CROXALL'S ESTATE, Penn., 29 Atl. Rep. 759.

122. WILL—Charities—Bequests to Educate Poor Children.—Testator left a fund in trust, the income to be spent "in the education of the most necessitous poor children" in the county; but if at any time the public funds should become sufficient to educate all the poor children of the county, then the income to be otherwise applied It appeared that all the funds provided by law for the county for the past year maintained the school for less than seven months; that the seating capacity of the schools was less by over 2,000 than the number of children of school age; that the deficit for the year was some $600: Held, that the contingency had not occurred.—SAPPINGTON v. SAPPINGTON SCHOOL FUND TRUSTEES, Mo., 27 S. W. Rep. 356.

123. WILLS—Devise to Charity—Power.—The provision, in a will, devising a farm as a home for disabled ministers, that no part of it shall be sold, disposed of, or incumbered, or applied to any other use or purpose than as a home for such ministers, merely prevents a disposition for any other purpose than the home, and does not prevent the selling of a remote tract, where the managers and the orphans' court think it for the interest of the home.—IN RE JOHN C. MERCER HOME FOR DISABLED CLERGYMEN OF THE PRESBYTERIAN FAITH, Penn., 29 Atl. Rep. 731.

124. WILL—Dower—Election.—Where a testator, after having made a will, giving his wife a life estate in certain real and personal and all his "mixed" property, acquires a homestead, the wife may take both the provisions made for her by the will and her homestead estate; as to require an election on her part in such case the testator's intention to exclude her homestead right must be manifest from the will.—SCHOOR v. ETLING, Mo., 27 S. W. Rep. 395.

125. WILL — Construction.— Testator, after making certain bequests, directed his executors to divide the remainder of his estate into four equal parts. He then devised one of said parts in trust for the sole benefit of his daughter for life, at her death to be conveyed to her issue. The other three parts he devised in like trust for the benefit of his three sons: Held, that the estate was to be divided into four equal parts, to be administered as four separate trusts, each child to receive the income from his part.—STEIN v. STEIN, Md., 29 Atl. Rep. 691.

126. WILLS — Counsel Fees and Expenses.—A will being attacked by an heir for want of mental capacity of testator, a compromise agreement by all interested was filed of record, and a verdict sustaining the will taken by consent. By the agreement plaintiff's share was made liable for defendant's counsel fees, but it was silent as to the other expenses of the contest: Held, that testator's estate was not chargeable with plaintiff's attorney's fees and expenses incurred in the will contest.—IN RE TITLOW'S ESTATE, Penn., 29 Atl. Rep. 758.

127. WILL—Legacies — When Charged on Land. — Where land is specifically devised in fee after the life estate specified in the will, without condition, and no intention is shown to charge it with certain pecuniary legacies in the will, the legatees have no lien on the land, or the proceeds of sale thereof, for the payment of such legacies.—PHILLIPS v. CLARK, R. I., 29 Atl. Rep. 688.

128. WILLS— Substitutional Legacy. — Testatrix directed her trustee to pay to her two granddaughters, M and C, $2,000 each, when each should reach the age of 21. Thereafter C died, and then another daughter, E, was born to C's parents. A codicil dated five years after ran: "I wish my granddaughter E to have two thousand dollars from my estate (the eldest daughter of I N). I have left the same amount to M:" Held, that the legacy to E was not a substitute of that to C, so as to be contingent on E's coming of age, but was absolute and presently payable.—IN RE FRY'S ESTATE, Penn., 29 Atl. Rep. 699.

129. WITNESS—Transaction with Decedent.—A statute providing that "whenever an original party to the contract or cause of action is dead the other party may be called as a witness by his opponent, but shall not be allowed to testify on his own offer" (Pub. St. ch. 214, § 33), does not prevent the defendant in an action by a surviving partner from testifying as to a conversation with the deceased partner, as, the conversation being with the partnership, the death of the partner is not the death of the "other party," within the statute.—CLAPP v. HULL, R. I., 29 Atl. Rep. 687.

Central Law Journal.

A LEGAL WEEKLY NEWSPAPER

Published by

Central Law Journal Company,

919 OLIVE ST., ST. LOUIS, MO.

To whom all communication should be addressed.

Subscription price, FIVE DOLLARS per annum, in advance. Single numbers, TWENTY-FIVE CENTS.

CONTENTS.